(1)

No. 99-7791-CFH Title: Kestutis Zadvydas, Petitioner
v.
Lynne Underdown and Immigration and Naturalization Service

Docketed:
January 13, 2000 Court: United States Court of Appeals for the Fifth Circuit

Vide:
00-38

Entry	Date	Proceedings and Orders
	Jan 11 2000	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due May 15, 2000)
	Feb 11 2000	Order extending time to file response to petition until March 15, 2000.
	Mar 16 2000	Order further extending time to file response to petition until April 14, 2000.
	Apr 17 2000	Supplemental brief of petitioner Kestutis Zadvydas filed.
	Apr 17 2000	Order further extending time to file response to petition until May 15, 2000.
	May 15 2000	Brief of respondents Lynne Underdown, et al. in opposition filed.
	May 24 2000	Reply brief of petitioner Kestutis Zadvydas filed.
	May 30 2000	LODGING consisting of petitioner's Supplemental Brief filed in the Fifth Circuit Court of Appeals.
	May 31 2000	DISTRIBUTED for Conference of June 15, 2000
	Jun 9 2000	Letter from Solicitor General received and distributed.
	Jun 19 2000	REDISTRIBUTED for Conference of June 22, 2000
	Jun 20 2000	Letter from Solicitor General received and distributed.
	Jun 27 2000	Letter of petitioner in response to June 20, 2000 letter from Solicitor General received.
	Sep 13 2000	REDISTRIBUTED for Conference of October 6, 2000
	Sep 20 2000	Supplemental brief of respondents Lynne Underdown, et al. filed.
	Oct 10 2000	Petition GRANTED. The case is consolidated with No. 00-38, Reno v. Ma, and a total of one hour is allotted for oral argument. SET FOR ARGUMENT February 21, 2001. **********
	Nov 24 2000	Joint appendix filed.
	Nov 24 2000	Brief of petitioner Kestutis Zadvydas filed.
	Dec 1 2000	LODGING consisting of twenty copies of four documents submitted by counsel for the petitioner.
	Dec 12 2000	Motion of respondent Ma and petitioner Zadvydas for additional time for oral argument and for divided argument filed.
	Dec 22 2000	Order extending time to file respondents' brief on the merits to and including January 5, 2001.
	Dec 26 2000	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Dec 27 2000	Record filed.
	Jan 5 2001	Brief of respondents Lynne Underdown and Immigration and Naturalization filed.

2P

No. 99-7791-CFH

Entry	Date	Proceedings and Orders
	Jan 5 2001	LODGING consisting of twenty copies of seven documents submitted by the Solicitor General.
	Jan 18 2001	CIRCULATED.
	Jan 22 2001	Motion of respondent Ma and petitioner Zadvydas for additional time for oral argument and for divided argument GRANTED.
	Feb 2 2001	Letter and Sixth Circuit decision received from the Solicitor General and distributed. VIDED.
	Feb 5 2001	Reply brief of petitioner Kestutis Zadvydas filed. VIDED.
	Feb 21 2001	ARGUED.

EDITOR'S NOTE

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ORIGINAL

NO. 99-7791

Supreme Court, U.S.
FILED
JAN 2000
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN;
U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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78 pp

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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN;
U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

_____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

QUESTIONS PRESENTED FOR REVIEW

The general question presented by this case is whether the Constitution prohibits the prolonged indefinite detention of an immigrant after entry of a final order of deportation when deportation cannot be effectuated. The three subsidiary constitutional questions are:

99-7791
Zadvydas
v.
Underdown

I.

Whether the circuit court erred in ruling that "resident aliens," like "excludable aliens," can be indefinitely detained.

II.

Whether the circuit court improperly invoked the "plenary power doctrine" absent a question of national sovereignty or foreign relations.

III.

Whether the circuit court failed to recognize the fundamental nature of petitioner's liberty interest to be free from physical restraint.

REPORTS OF OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported (**Zadvydas v. Underdown**, 185 F.3d 279 (5th Cir. 1999)), as is the decision of the United States District Court for the Eastern District of Louisiana (**Zadvydas v. Caplinger**, 986 F.Supp. 1011 (U.S.D.C., E.D.La. 1997)). The order denying the petition for rehearing issued on October 13, 1999, is unreported. Copies of all three documents are appended to this petition.

JURISDICTION

The decision by the United States Court of Appeals for the Fifth Circuit reversed the United States District Court for the Eastern District of Louisiana's order of October 30, 1997.

Consequently, petitioner files the instant application for a writ of certiorari under the authority of Title 28, United States Code, Section 1254(1).

BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction was proper in the United States District Court for the Eastern District of Louisiana as this matter relates to a petition properly filed therein pursuant to Title 28, United States Code, Section 2241.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

(i) **Procedural History**.

On September 15, 1995, the petitioner, Kestutis Zadvydas, filed a pro se Petition for Writ of Habeas Corpus in the Western District of Louisiana contesting detention by the United States Immigration and Naturalization Service (INS). (R.A., Vol.1, pp.29-35.) On February 28, 1996, a United States District Judge in the Western District of Louisiana transferred this case to the Eastern District of Louisiana because the petitioner had been transferred from a federal detention center in Oakdale, Louisiana, to a center in New Orleans. (R.A., Vol.1, p.22.) The United States Magistrate Judge for the Eastern District of Louisiana held an evidentiary hearing on September 27, 1996. On February 3, 1997, after both parties filed supplemental memoranda in the case, the United States Magistrate Judge for the Eastern District of Louisiana issued his Report and Recommendation denying petitioner's application for habeas relief. (R.A., Vol.3, pp.709-732.) Petitioner objected to the Magistrate's Report and Recommendation and asked the district court to review the Magistrate's ruling. (R.A., Vol.3, pp.654-683.)

On October 30, 1997, the district court issued its Order and Reasons granting petitioner's writ of habeas corpus. The district court held that INS' indefinite detention of petitioner, pending deportation, violated his right to substantive due process. (R.A., Vol.3, pp.521-556.) On November 19, 1997, a psychiatric report was issued. The psychiatrist found the petitioner to be, "at the present time [neither] dangerous to himself; or to others. . . "

The district court held an additional hearing on November 21, 1997. After the hearing, the government filed a Motion to Alter or Amend Judgment. On November 26, 1997, the district court issued its formal judgment granting petitioner's writ of habeas corpus and ordered petitioner's release pursuant to Title 28, United States Code, Section 2241. The district court denied the government's Motion to Alter or Amend Judgment. (R.A., Vol.4, p.792.)

The government timely filed a Notice of Appeal. (R.A., Vol.4, pp.788-790.) On August 11, 1999, the United States Court of Appeals for the Fifth Circuit reversed the district court's decision. On October 13, 1999, the circuit court denied a petition for rehearing. The circuit court did stay the issuance of the mandate pending filing of this writ. A copy of the circuit court

opinion is attached, as is the district court opinion and the denial of the rehearing. (APPENDIX).

(ii) **Statement of Facts**

The petitioner was born on November 21, 1948, in a displaced persons' camp in a region of Germany governed by the United States following World War II. His parents were from Lithuania, but it is not clear whether either or both were ever citizens of that country.[1] In 1956, at the age of eight, petitioner was admitted into the United States in connection with a program for the relocation of displaced persons. The petitioner resided continuously in the United States for over forty years as a legal, permanent resident.

On December 8, 1966, Mr. Zadvydas was convicted in the New York Supreme Court, Queens County, of attempted robbery, third degree. On February 7, 1974, he was convicted in New York Supreme Court, Kings County, for attempted burglary, third degree.

The United States Immigration and Naturalization Service (INS) issued an order to show cause on July 6, 1977, alleging that Mr. Zadvydas was deportable. On July 13, 1977, the petitioner was

[1]His mother denies ever being a Lithuanian citizen.

granted release on his own recognizance and allowed to remain at large pending disposition of his deportation case.

In July, 1982, the INS notified him that his hearing before an immigration judge had been rescheduled to August 25, 1982. He failed to appear for his August hearing. The INS sent registered letters to his last known address but petitioner had moved and never received the letters. During this period, he married, parented a child, worked at gainful employment, filed income tax returns, and obtained an extension of reissuance of his immigration card (green card).

On August 17, 1992, petitioner was convicted in Circuit Court of Fairfax County, Virginia, for a 1987 offense of possession of a cocaine with intent to distribute. He was sentenced to sixteen years in jail with six years suspended. He served two years and was paroled in January, 1994. He was immediately taken into custody by the INS and deportation proceedings were begun. The INS detained Mr. Zadvydas without bond based upon his aggravated felony conviction. A bond determination hearing was held and the immigration judge denied the petitioner's request for a change in status and ordered that petitioner remain in custody without bond. The immigration judge based this decision on the likelihood that Mr. Zadvydas would fail to appear for future

immigration hearings. The Board of Immigration Appeals (BIA) denied Mr. Zadvydas' appeal.

On March 29, 1994, a deportation hearing was held. At that hearing, Mr. Zadvydas admitted all allegations and was found deportable. Seeking relief from deportation, the petitioner applied for a waiver under the Immigration and Nationality Act, which was denied on April 26, 1994. Mr. Zadvydas was then ordered deported from the United States to Germany.

In May, 1994 the INS Officer-In-Charge (OIC) in Oakdale, Louisiana, began petitioner's deportation which, as of today, has still not occurred. The petitioner emigrated from Germany when he was eight years old. Thirty-six years later, in response to an ambiguous question, he incorrectly represented to the immigration judge he was a German citizen. Germany, however, correctly informed the INS that he is not a German citizen even though he was born in a German holding camp. Lithuania also denies that petitioner is a citizen, even though his parents were once residents of Lithuania. Mr. Zadvydas has expressed a willingness to relocate to any country that will accept him. No country, however, has ever issued him travel documents. As such, petitioner is "stateless" and was being detained indefinitely since the INS was, and still is, unable to find a country that will grant him entry.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Presently pending in the United States Court of Appeals for the Ninth Circuit is **Kim Ho Ma v. Janet Reno, et al**, Case Number 99-3596, which raises the same issues that are involved in the instant matter.[2] **Kim Ho Ma** is set for oral argument on February 14, 2000. It is respectfully requested that a ruling on this application for certiorari be deferred for a reasonable period to allow the Ninth Circuit to decide **Kim Ho Ma**. Should the Ninth Circuit rule for the resident alien, a split in the circuits would exist requiring this Court to resolve the conflict between the two circuit courts. In the event the Ninth Circuit follows **Zadvydas**, certiorari should be granted for the following reasons.

OVERVIEW

Certiorari should be granted to review the decision of the United States Court of Appeals for the Fifth Circuit because the circuit court held "resident aliens" and "excludable aliens" to be identically situated regarding their substantive due process

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[2]A five judge panel in Federal District Court ruled in favor of **Kim Ho Ma** and several deportable aliens, *sub nom*, **Phan v. Reno**, 56 F.Supp.2d 1149 (W.D. Wash., 1999).

right to be free from indefinite detention.[3] Petitioner was indefinitely detained because the Immigration and Naturalization Service's (INS') requests, to grant entry, made to the relevant countries (Lithuania and Germany) were denied. No country recognizes petitioner as a citizen, rendering him stateless.

The circuit court adopted the INS' argument that "once a resident alien . . . is ordered deported [he or she] may claim no greater [constitutional] rights than an excludable alien . . . " **Zadvydas v. Underdown**, 185 F.3d 279, 285 (5th Cir. 1999). Had the circuit court ruled for the petitioner, his status as a "person" under the Constitution would have mandated his release. If an individual is a "person," under the Constitution, he cannot be indefinitely confined civilly based solely on a finding of dangerousness. **Kansas v. Hendricks**, 521 U.S. 346, 358-61 (1997); **Foucha v. Louisiana**, 504 U.S. 71, 77 (1992); **Jones v. U.S.**, 463 U.S. 354, 363 (1983); **Addington v. Texas**, 441 U.S. 418, 428 (1979). However, pursuant to the regulations in effect when the circuit court rendered its decision, 8 C.F.R. 236.1(d)(2)(ii),

[3]Generally speaking, "resident aliens" are individuals who have entered the United States in compliance with the requirements of immigration laws and regulations. "Excludable aliens," while physically present within the United States, are legally classified under the "exclusion fiction" as never having entered the country.

236.1(d)(3)(iii), 241.4 and 241.5, as explained in Immigration and Naturalization Services (INS) Director Pearson's memorandum of February 3, 1999, an INS District Director needs only make a finding of dangerousness to indefinitely detain a person such as petitioner. **Zadvydas**, at 287.

No decision, either in this Court or the circuit courts, has so severely limited the rights of "resident aliens." For this reason, three important constitutional issues need to be resolved:

(1) Are "resident aliens" no longer persons under the Due Process Clause of the Constitution because their standing regarding indefinite detention now is indistinguishable from that of "excludable aliens?"

(2) Did the circuit court incorrectly invoke the "plenary power doctrine," absent issues of national sovereignty and foreign relations?

(3) Did the circuit court fail to recognize the fundamental nature of petitioner's liberty interest to be free from physical restraint?

1. Historically Resident Aliens Possess Greater Rights than Do Excludable Aliens.

Petitioner is not excludable. He is a former permanent legal resident alien subject to a final order of deportation. Once aliens are admitted, their constitutional status changes so that they enjoy due process rights including a fundamental liberty interest in personal freedom under the Fifth Amendment. **Reno v. Flores**, 507 U.S. 292, 315-316 (1993)(J. O'Connor, concurring). In reversing the district court, the appellate court reasoned that this Court's more recent decisions recognizing the greater rights of resident aliens in relation to excludable aliens were limited to procedural rights. The circuit court therefore incorrectly held that a resident alien's substantive due process right to personal liberty was the same as that afforded excludable aliens.

Admittedly, the authorities relied on by the circuit court are procedural due process decisions. However, the broad language in those cases recognizes the constitutional rights of resident aliens and contains no such limitation. These Supreme Court pronouncements demonstrate an expansion of due process rights for resident aliens, not, as the circuit court concluded, a narrowing of the protections afforded to such persons by the Fifth Amendment.

2. The Plenary Power Doctrine Does Not Require Courts to Defer to the INS' Prolonged Detention of Resident Aliens.

The plenary power doctrine places questions involving aliens outside the purview of the judiciary - deferring immigration matters to the political branches' discretion. Such agencies have unfettered authority to deport non-citizens. Although deference is accorded to the political branches in immigration matters, this Court now scrutinizes an individual's right to due process of law. **Reno v. Flores**, 507 U.S. 292, 305 (1993). The circuit court incorrectly invoked the plenary power doctrine where no national sovereignty or foreign relations concerns exist.

The government's sovereignty interest is greater in the case of an excludable alien than it is in the case of a resident alien. When a country like Cuba deposits thousands of aliens on our shores, the governmental interest in effectuating their expulsion (and not permitting them to enter) necessarily affects the United States' sovereignty. In contrast, this case concerns only a single deportable alien who the United States has already admitted. He cannot be deported because his purported country of origin will not accept him. The circuit court gives no explanation as to why a foreign government's refusal to accept such an alien

would be changed by either his confinement or his release. In sum, this case presents no national sovereignty or foreign relations issues.

3. The Circuit Court Failed to Recognize the Fundamental Nature of Petitioner's Liberty Interest to be Free From Physical Restraint.

The circuit court relegated the petitioner to a status it characterized as less than that of a citizen with respect to his Fifth Amendment right to personal liberty. This conclusion relies on rights that are far less fundamental than the right at issue here. The decisions cited involved protections such as a person's right to Medicare, employment, government services and freedom of speech. As is evident, none of those decisions held that continued, indefinite confinement of a resident alien was constitutionally permissible. Because the substantive due process protection at issue here is far more fundamental than the above rights, the petitioner submits that the circuit court's analogy simply does not apply under the facts of this case.

Since detention is one of the most serious deprivations of liberty that the government can impose, it is ordinarily reserved in this country as punishment for those convicted of

serious criminal offenses. Moreover, the Immigration and Naturalization Service (INS) does not possess the general detention power to incarcerate aliens in order to protect society; that is the role of the criminal justice system. The INS can only detain aliens for the purpose of facilitating their removal. Thus, because the INS is unable to effectuate petitioner's deportation, the INS no longer has a legitimate immigration interest in the petitioner's continued detention. Petitioner's continued detention is therefore excessive in relation to the government's immigration purpose. Petitioner's continued detention, with no end in sight, accordingly violates his right to due process of law.

LAW AND ARGUMENT

A. "Resident Aliens" are Persons Under the Due Process Clause Regarding Indefinite Detention.

This Court has repeatedly held that the source of due process protection is the alien's territorial presence in the United States, as well as the alien's ties to the United States that he develops as a result of that presence. See, **Plyler v. Doe**, 457 U.S. 202, 212 (1982); **Mathews v. Diaz**, 426 U.S. 67, 77 (1976); **Kwong Hai Chew v. Colding**, 344 U.S. 590, 596 (1952); **Wong Wing v. United States**, 163 U.S. 228, 237 (1986). See **Landon v. Plasencia**, 459 U.S. 21, 32 (1982); **Kwong Hai Chew**, 344 U.S. at 596, n.5.

Petitioner has lived in the United States continuously for the past forty-three years. His wife, daughter, mother, numerous brothers and sisters all reside in the United States. These ties, along with his territorial presence in the United States, are the basis for his constitutional status as a holder of due process rights. The entry of a final order of deportation does not now place him in the position of an excludable alien. Cf. **United States v. Witkovich**, 353 U.S. 194, 201 (1957)(recognizing that an alien with an outstanding final order of deportation

remains a "person" under the Due Process Clause and construing immigration statute narrowly to avoid constitutional defects that would otherwise arise).

This Court has long acknowledged a resident alien's constitutional rights. Given such longstanding acknowledgment, the Fifth Circuit errs in equating excludable aliens with resident aliens. The Fifth Circuit erred in holding "[t]he need to expel [resident aliens] is identical from a national sovereignty perspective [as that of excludable aliens]" **Zadvydas**, at p.296.

Excludable aliens and resident aliens are not identical. To reach the conclusion that the two groups are identical, the circuit court hinged its holding on a legal fiction that solely applies to excludable aliens, i.e. "[a]lthough an [excludable] alien is physically present in the U.S., 'his detention . . . is only a continuation of exclusion.'" **Thien Van Vo v. Joseph Green**, 63 F.Supp.2d 1278, 1283 (U.S.D.C. D.Colo. 1999).

By equating excludable aliens with long term permanent residents, the **Zadvydas** court ignores his legal admission into this country, his forty-three years in this country, and most importantly, his constitutional status acquired based on the above. If someone has never been excluded, there can be no continuation of exclusion. The case law favors resident aliens precisely because

their interests are so much stronger than that of someone who is attempting to gain entry into the United States. **Thien Van Vo**, 63 F.Supp.2d at 1283.

The circuit court further reasoned that "resident aliens" are not entitled to a substantive due process right to be free from physical restraint because to hold otherwise requires that "excludable aliens" be viewed "as non-persons wholly unprotected by the Constitution." **Zadvydas v. Underdown**, 185 F.3d 279, 296 (5th Cir. 1999). The circuit court stated that such a holding would conflict with two of its previous decisions involving "excludable aliens" making "excludable aliens" subject to the rack and the screw, the Eighth Amendment notwithstanding. **Zadvydas**, at 296. Citing, **Gisbert v. United States**, 988 F.2d 1437 (5th Cir. 1993); **Lynch v. Cannatella**, 810 F.2d 1363 (5th Cir. 1987).

Indeed, there is no conflict. Holding resident aliens to possess a substantive due process right to be free from indefinite detention is fully consistent with the holdings in **Gisbert** and **Lynch**. Both decisions employ a balancing test. In **Lynch**, an excludable alien's interest in being free from gross physical abuse outweighed the government's minimal immigration interest. **Gisbert** balanced excludable aliens' liberty interest against the governmental interest in protecting the national sovereignty from

Cuba depositing thousands of aliens on our shores. Here, Lithuania has not deposited even one individual on our shores. On the contrary, this country in 1956-57 decided to admit the Zadvydas' family - when they resided in Germany - it was the actions of the United States, not Lithuania, that brought the petitioner to this country. The circuit court gives no explanation as to how the INS' decision forty years later to deport the petitioner protects national sovereignty, or impacts relations between the United States and Lithuania.

The holding is based on the assumption that Congress' interest in detaining excludable aliens and its interest in detaining deportable aliens involve the same national sovereignty concerns. This is not so. Congress' interest in the two situations is extremely different. In the case of excludable aliens, Congress must prevent other nations from unilaterally shipping their citizens here. Without the detention of such persons, they could enter the United States simply by virtue of reaching United States' soil. Unlike excludable aliens - aliens who the United States has never agreed to admit - deportable aliens have, by definition, "entered" the United States in accordance with law. Congress has elected to admit such persons with, or without, the interference from other nations. While Congress may later

decide to remove those persons, its decision to admit is not influenced by the will of other nations; the "national sovereignty" interests at stake in the detention of excludables are not applicable to the detention of deportables. Accordingly, national sovereignty interests and foreign relations between the United States and Lithuania, do not depend in any manner on whether petitioner is confined or released.

As the circuit court candidly conceded, detention of resident aliens who cannot be removed is based on Congress' fear that the aliens "may commit crimes against the general population." **Zadvydas v. Underdown**, 185 F.3d 279, 296 (5th Cir. 1999). General crime reduction is not an immigration matter, and legislation that Congress passes in furtherance of crime reduction should not be governed by the reduced constitutional standard applicable to "excludable aliens."

B. The Plenary Power Doctrine is Not Applicable.

In reaching its decision, the United States Court of Appeals for the Fifth Circuit relied on two cases invoking the "plenary power doctrine." **Shaughnessy v. United States ex rel Mezei**, 345 U.S. 206 (1953); **United States ex rel Knauff v.**

Shaughnessy, 338 U.S. 537 (1950); **Zadvydas**, p.288. The plenary power doctrine places questions involving aliens outside the purview of the judiciary and, accordingly, defers immigration matters to the discretion of the political branches.

Mezei and **Knauff** "marked the high point of the plenary power doctrine. . .", Constitutional questions involving aliens are now scrutinized by this Court. Nancy Morawetz, *Rethinking Retroactive Deportation Laws And The Due Process Clause*, 73 N.Y.U.L. Rev. 97, 125-126 (1998). Although deference is still paid to the political branches in immigration matters, this Court has made "clear that there is some role to be played by this Court in such cases."

Two recent decisions in this area demonstrate a willingness to evaluate constitutional claims outside of the context of the plenary power doctrine. Morawetz, 73 N.Y.U.L. at p.129.[4]

In a case involving confinement of alien children pending deportation, this Court reached the constitutional issues despite noting that the regulation of the relationship between this country

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[4]Equally significant, **Mezei** is also distinguishable because it implicated national security concerns during the most dangerous period of the Cold War.

and "alien visitors has been committed to the political branches of the Federal Government." **Reno v. Flores**, 507 U.S. 292, 305 (1993)(quoting, **Mathews v. Diaz**, 426 U.S. 67, 81 (1976)). Justice O'Connor in her concurrence stated that the INS' actions were being upheld precisely because those actions complied "with [the] requirements of due process." **Flores**, at p.315. This Court in **Flores** concluded that it was duty bound to consider the constitutionality of the aliens' confinement. And, as Justice O'Connor noted, freedom from confinement for aliens as for other "persons" is a core liberty interest. **Flores**, citing, **Foucha v. Louisiana**, 504 U.S. 71, 80 (1992).

In **Landon v. Plasencia**, 459 U.S. 21, 34-35 (1982), the Court, while again noting "that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature. . . ," nevertheless remanded the case to determine if the INS afforded due process to the resident alien. The Court balanced the government's interest (the efficient administration of the immigration laws) against the interest of the resident alien to stay, work and live in the United States. **Plasencia**, 459 U.S. at 21. **Plasencia** made clear that whatever role plenary power once played in immigration cases, it no longer simply places constitutional questions outside the reach of the judiciary.

The circuit court twice invoked the "plenary power doctrine" to place the petitioner's detention beyond constitutional scrutiny. First, as discussed above, the court found petitioner's situation indistinguishable from that of excludable aliens. As a result, the decision conjured up prospects that national sovereignty was somehow protected by petitioner's indefinite detention. Secondly, the court found that the "plenary power doctrine" precluded releasing the petitioner because this Court, "has accepted collateral damage to the constitutional rights of citizens as an acceptable price to pay in deference to the plenary power over aliens of the political branches of . . . government." **Zadvydas**, p.289.

No case has ever found the Due Process Clause to be unavailable to a "resident alien" who has been indefinitely detained based on the doctrine of plenary power. Essentially, the circuit court has extended **Mezei**, which at best allows detention of excludable aliens, to legally permit the indefinite detention of "resident aliens." In support of this groundbreaking legal precedent, the court cited **Mathews v. Diaz**, 426 U.S. 67, 96 (1976), a case that does not even discuss, much less rely on, the plenary

power doctrine.[5] The circuit court cites a statement from **Diaz** noting that the INS' authority, generally, is broader than allowed in most other legal arenas. None of the cases cited involved the detention of resident aliens. Rather, the cases only gave an overall view of the INS' authority. Moreover, **Diaz** employed a "rational basis test." As will be discussed, questions involving deprivation of liberty are decided under the strict scrutiny standard.

In sum, the plenary power doctrine has never authorized the indefinite detention of resident aliens and should not here. Because petitioner's detention bears no relation whatsoever to either the protection of national sovereignty or the facilitation of foreign relations no purpose is served in his indefinite detention.

C. The Petitioner's Liberty Interest is Far More Fundamental than the Rights Relied On By the Circuit Court in Its Decision.

The circuit court cited a number of decisions by this Court to demonstrate an alien's diminished status under the

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[5]An oblique reference is made to this doctrine in a footnote which cites several cases employing the doctrine. **Mathews v. Diaz**, p.82, n.17.

Constitution in contrast to that afforded citizens. The cases are not analogous because an individual's right to personal liberty is far more fundamental than the rights at issue in those decisions.

The cases in question dealt with a person's right to Medicare, employment, government services and freedom of speech. **Cabell v. Chaves-Saldino**, 454 U.S. 432 (1982)(state's preclusion of resident aliens from basic governmental functions); **DeConces v. Bica**, 424 U.S. 351 (1976)(state's exclusion of illegal resident aliens from maintaining employment within its borders); **Matthews v. Diaz**, 426 U.S. 67 (1976)(denial of Medicare by federal government, to lawful resident aliens who have resided in United States less than five years); **Kleindienst v. Mandel**, 408 U.S. 753 (1972)(denial, through exclusion, of alien's First Amendment right to speak and denied of United States citizen's First Amendment right to communicate with aliens espousing Marxist's beliefs); and **United States v. Williams**, 194 U.S. 279 (1904)(similar to **Kleindienst**, alien placed in exclusion proceedings in violation of his First Amendment right to freedom of speech).

As is evident, none of these decisions held that continued, indefinite confinement of a resident alien was constitutionally permissible. The circuit court cites no authority other than the above cases to support its holding that the Due

Process Clause does not bestow a right to personal liberty on resident aliens under final orders. Because the substantive due process protection at issue here is far more fundamental than the rights that were the focus of the above cases, petitioner submits that the lower court's analogy simply does not apply under the facts of this case.

D. Conclusion

Clearly, petitioner's confinement was civil in nature. This Court has ruled that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." **Addington v. Texas**, 441 U.S. 418, 425 (1979). This Court further concluded that, "freedom from bodily restraint has always been at the core of the liberty [interest] protected by the Due Process Clause from arbitrary governmental action." **Foucha v. Louisiana**, 504 U.S. 71, 80 (1992). The "right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security" is a traditional liberty protected by the Due Process Clause. **Vitek v. Jones**, 445 U.S. 480, 492 (1980) (quoting **Ingraham v. Wright**, 430 U.S. 651, 673 (1977)).

Government incarceration is the classic deprivation of liberty, which the government may not accomplish without according the guarantees of due process. **Foucha** at p.80; **See also**,

Cabreja-Rojas v. Reno, 999 F.Supp. 493, 496 (S.D.N.Y. 1998)(holding that an alien detained pursuant to final order of deportation has a private interest in freedom from confinement, a liberty interest of the highest constitutional order); **St. John v. McElroy**, 917 F.Supp. 243, 250 (S.D. N.Y. 1996); **Ekekhor v. Aljets**, 979 F.Supp. 640 (N.D. Ill. 1997).

The circuit court found that protecting society from potentially dangerous aliens provided a rational purpose for continuing his incarceration. Apparently, the likelihood, or more to the point here, unlikelihood of petitioner being deported in the foreseeable future is not even a factor to be considered in determining the constitutionality of his incarceration.[6] This

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[6]For the same reason this country will not grant petitioner citizenship, other countries are also likely to decline him citizenship. Lithuania precludes citizenship to "persons who, before coming to Lithuania, have been sentenced in another state to imprisonment for a deliberate crime for which criminal liability is imposed by the laws of the Republic of Lithuania . . ." Ruta M. Kalvaitis, *Citizenship and National Identity in the Baltics*, 16 Boston Univ. International Law Journal 231, 266-267 (1998). Kestutis Zadvydas has two burglary convictions and a robbery conviction. Burglary and robbery are *mala in se* offenses and would be crimes in any country.

Additionally, two international conventions, the *Status Convention* and *Reduction Convention* address the issue of statelessness. Kalvaitis, at p.251. Lithuania has not signed either convention. Kalvaitis at pp.252-253. However, even if Lithuania becomes a signatory to the *Reduction Convention*, the convention allows a state to deny citizenship to stateless

conclusion is incorrect for two reasons: 1) because petitioner cannot be removed from the United States, his detention does not serve the purpose of effectuating his deportation; 2) a finding of dangerousness alone cannot justify the deprivation of an individual's liberty.[7] See, **e.g.**, **Kansas v. Hendricks**, 521 U.S. 346 (1997)(dangerousness alone is not enough to justify civil commitment); **Foucha v. Louisiana**, 504 U.S. 71, 77 (1992)(striking

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persons who have been convicted of a criminal offense. Kalvaitis, p.267. So not only does Lithuanian law preclude citizenship to stateless criminals, so does international law as embodied in the *Reduction Convention*. Petitioner, if reincarcerated, still would have no end in sight to his confinement.

[7]The petitioner is not dangerous. Despite the Temporary Period Custody Rules (TPCR) having been in effect for over a year of his custody, the INS while advising the district court that it reviewed petitioner's status under the TPCR, also advised that it had determined that he could not be released under those rules. While the INS told the district court that it determined that the petitioner was dangerous, it never explained how it reached this conclusion. The determination of dangerousness was made without benefit of a psychiatrist or other mental health professional. It was not until the district court issued its October 30, 1997, order that the INS endeavored to obtain the opinion of a psychiatric expert at the court's direction. On November 19, 1997, in anticipation of petitioner's release, a psychiatrist concluded petitioner was not a danger to himself, nor was he a danger to others. The government, in reference to this finding, has never produced evidence disputing the psychiatric evaluation. Indeed, the circuit court, based on the government's acknowledgment at oral argument, states petitioner has "complied with the district court's release conditions and. . . conducted himself as a productive member of society." **Zadvydas**, p.284.

down a state statute that authorized continued confinement of insanity acquittees who were no longer mentally ill, but who remained dangerous). Dangerousness can justify temporary detention pending criminal process, but not prolonged detention. See, **United States v. Salerno**, 481 U.S. 739, 747 n.4 (1987)(suggesting that pretrial detention can become excessively prolonged and thereby violate Due Process Clause).

Because this case concerns the deprivation of liberty, it triggers a strict scrutiny standard in determining whether that deprivation violated due process and under that standard any infringement of personal liberty must be narrowly tailored to serve a compelling government interest. **Thien Van Vo**, at p.1284 (citing; **Reno v. Flores** and **United States v. Salerno**, 481 U.S. 739 (1987)). For detention to serve a compelling government interest, it first must be determined whether it was imposed for the purpose of punishment or for some other governmental purpose. **Schall v. Martin**, 467 U.S. 253 (1984).

Here, there is no intent to punish so detention is incidental to another government purpose, namely, removal of the alien. It therefore must be determined if detention appears excessive in relation to that purpose. **Thien Van Vo v. Joseph Green**, 63 F.Supp.2d 1278, 1284 (U.S.D.C., D.Colo. 1999).

If it is less likely that the INS can actually deport the alien, then the government's interest in detaining him becomes less compelling and the deprivation of the resident alien's liberty more severe. The petitioner's deportation depends on the occurrence of one, or more, of several very unlikely events: 1) the location of seventy year old birth records somewhere in Lithuania which the government, after five and a half years, as of this date, has not even initiated a search for;[8] 2) some other country granting the petitioner citizenship and allowing him to repatriate, even though his ties with other nations are even more tenuous than with Lithuania; and 3) the highly unlikely prospect that other countries will invite him to become a citizen despite his criminal history. In view of these considerations, the petitioner's detention was excessive in relation to the purpose for which it was being imposed because deportation was not, and is not, realizable in the foreseeable future.

The district court, using the above analysis, found that, "petitioner's detention . . . with no end in sight. . . is an

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[8]Lithuania and Germany have both responded that petitioner is not a citizen and refused to repatriate him. Lithuania stated that it would review his status if he could produce his parents' Lithuanian passport or Lithuanian birth certificate; none of these documents exist to the best of petitioner's and his family's knowledge.

excessive means of accomplishing the purpose sought [deportation] . . . " **Zadvydas v. Caplinger**, 986 F.Supp. 1011, 1027 (U.S.D.C., E.D.La. 1997). The district court further reasoned that when, "deportation is not realizable . . . continued detention . . . loses its *raison d'etre*." At p.1026. Petitioner's detention does not protect the national sovereignty, nor does it affect foreign relations. His confinement serves only one purpose and that is Congress' attempt to effect a general reduction in crime. Until the circuit court's decision, an individual could not be incarcerated for a crime without first being convicted at trial or, if civilly committed, he could not be confined based solely on a finding of dangerousness. Because the INS has indefinitely detained petitioner, a deportable alien, based solely on his alleged dangerousness, his continued confinement violates his right to due process of law.

RELIEF REQUESTED

WHEREFORE, this Honorable Court is urged to grant a Writ of Certiorari, vacate the ruling of the United States Court of Appeals for the Fifth Circuit, and reinstate the judgment of the district court granting petitioner's writ of habeas corpus. It is also respectfully requested that this Honorable Court defer ruling on this application for a writ of certiorari for a reasonable period to allow the Ninth Circuit to decide **Kim Ho Ma**.

Respectfully submitted this 11th day of January, 2000.

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LSBA NO. 2760

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN;
U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

A P P E N D I X

1. Opinion of the United States District Court for the Eastern District of Louisiana.

2. Opinion of the United States Court of Appeals for the Fifth Circuit.

3. Order denying petition for rehearing/reconsideration.

APPENDIX "A"

Kestutis ZADVYDAS, Plaintiff,
v.
John B.Z. CAPLINGER and Immigration and Naturalization Service, Defendants.

Civil Action No. 96-0810.

United States District Court,
E.D. Louisiana.

Oct. 30, 1997.

Alien objected to report and recommendation of United States Magistrate Judge Moore, which recommended that his application for writ of habeas corpus be denied. The District Court, Fallon, J., held that: (1) alien was not deprived of due process, given that his waiver of counsel during deportation hearing was constitutionally valid and there was no fundamental unfairness in immigration judge's acceptance of this waiver, and (2) four year detention of legal alien who was under final order of deportation and who was aggravated felon was excessive and violated alien's right to substantive due process.

Writ granted.

[1] ALIENS ⇐40
24k40
Immigration and Nationality Act (INA) section governing judicial review of removal orders, as amended by Illegal Immigration and Reform and Immigrant and Responsibility Act (IIRIRA), applies retroactively, without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings. Immigration and Nationality Act, §§ 242, 242(g), as amended, 8 U.S.C.A. §§ 1252, 1252(g).

[2] HABEAS CORPUS ⇐447
197k447
Habeas corpus will lie to protect fundamental liberties guaranteed under Constitution. 28 U.S.C.A. § 2241.

[3] HABEAS CORPUS ⇐205
197k205
Congress did not repeal, by implication, statute establishing federal courts' power to grant writ of habeas corpus by enacting Illegal Immigration and Reform and Immigrant and Responsibility Act (IIRIRA); IIRIRA did not amend, or even mention, statute. 28 U.S.C.A. § 2241; Immigration and Nationality Act, § 101 et seq., as amended, 8 U.S.C.A. § 1101 et seq.

[4] HABEAS CORPUS ⇐521
197k521
Habeas corpus review is justified if alien subject to order of deportation based on violation of crimes enumerated by Congress demonstrates some grave constitutional error or fundamental miscarriage of justice. U.S.C.A. Const. Art. 1, § 9, cl. 2; 28 U.S.C.A. § 2241.

[5] CONSTITUTIONAL LAW ⇐253(1)
92k253(1)
Substantive due process prevents government from engaging in conduct that shocks conscience or interferes with rights implicit in concept of ordered liberty. U.S.C.A. Const.Amend. 5.

[6] CONSTITUTIONAL LAW ⇐255(1)
92k255(1)
Procedural due process ensures that government action depriving person of life, liberty, or property is implemented in fair manner. U.S.C.A. Const.Amend. 5.

[6] CONSTITUTIONAL LAW ⇐278(1)
92k278(1)
Procedural due process ensures that government action depriving person of life, liberty, or property is implemented in fair manner. U.S.C.A. Const.Amend. 5.

[7] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Fifth Amendment entitles aliens to due process of law in deportation proceedings, and accordingly, immigration judge must conduct deportation hearings in accord with standards of due process. U.S.C.A. Const.Amend. 5.

[8] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Due process violation exists when defect in deportation hearing impinges upon fundamental fairness of hearing and there exists substantial prejudice. U.S.C.A. Const.Amend. 5.

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[9] ALIENS ⇐54(4)
24k54(4)
Although Congress has provided by statute that alien has right to obtain counsel at his own expense, alien does not have Sixth Amendment right to counsel in immigration proceeding; any right alien may have in this regard is grounded in Fifth Amendment guarantee of due process, rather than Sixth Amendment right to counsel. U.S.C.A. Const.Amends. 5, 6.

[9] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Although Congress has provided by statute that alien has right to obtain counsel at his own expense, alien does not have Sixth Amendment right to counsel in immigration proceeding; any right alien may have in this regard is grounded in Fifth Amendment guarantee of due process, rather than Sixth Amendment right to counsel. U.S.C.A. Const.Amends. 5, 6.

[10] CRIMINAL LAW ⇐641.4(2)
110k641.4(2)
In order for waiver of right to counsel to be valid, it must be made knowingly and intelligently. U.S.C.A. Const.Amend. 6.

[11] CONSTITUTIONAL LAW ⇐274.3
92k274.3
If alien's waiver of counsel was not made knowingly or intelligently, then immigration judge's acceptance of it constitutes due process violation if it impinged upon fundamental fairness of hearing and resulted in substantial prejudice. U.S.C.A. Const.Amend. 5.

[12] CRIMINAL LAW ⇐641.4(2)
110k641.4(2)
Whether waiver of right to counsel has been made knowingly and intelligently depends upon particular facts and circumstances surrounding case, including background, experience, and conduct of accused. U.S.C.A. Const.Amend. 6.

[13] CRIMINAL LAW ⇐273.1(1)
110k273.1(1)
Test for determining validity of guilty plea is whether plea represents voluntary and intelligent choice among alternative courses of action open to defendant.

[14] ALIENS ⇐54(4)
24k54(4)
Alien was not deprived of due process, given that his waiver of counsel during deportation hearing was constitutionally valid and there was no fundamental unfairness in immigration judge's acceptance of this waiver; alien should have known about value of counsel in legal proceedings due to his extensive first hand knowledge of criminal justice system, and he was specifically told that he had right to counsel and was advised about ramifications and possible consequences of his admissions. U.S.C.A. Const.Amend. 5.

[14] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Alien was not deprived of due process, given that his waiver of counsel during deportation hearing was constitutionally valid and there was no fundamental unfairness in immigration judge's acceptance of this waiver; alien should have known about value of counsel in legal proceedings due to his extensive first hand knowledge of criminal justice system, and he was specifically told that he had right to counsel and was advised about ramifications and possible consequences of his admissions. U.S.C.A. Const.Amend. 5.

[15] ALIENS ⇐54(3.1)
24k54(3.1)
Nature of deportation hearing is civil in nature, and consistent with civil nature of proceeding, various protections that apply in context of criminal trial do not apply in deportation.

[16] ALIENS ⇐54(4)
24k54(4)
Waiver of counsel in deportation hearing need not be made with apprehension of range of allowable punishments and all other facts essential to broad understanding of matter.

[17] ALIENS ⇐54(4)
24k54(4)
Fact that immigration judge failed to inform alien of possibility of prolonged detention did not alter fact that his waiver of counsel in deportation hearing was made knowingly.

[18] ALIENS ⇐54.1(2)
24k54.1(2)
Alien bears burden of demonstrating that his request for waiver of deportability warrants favorable

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consideration pursuant to Immigration and Nationality Act (INA) section permitting aliens admitted for permanent residence who have maintained lawful domicile in United States for seven consecutive years to continue residing in United States, in Attorney General's discretion, notwithstanding their deportability under other sections of Act. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C.A. § 1182(c).

[19] ALIENS ⇐53.10(2)
24k53.10(2)
Attorney General has unusually broad discretion in granting and denying waivers of deportability pursuant to Immigration and Nationality Act (INA) section permitting aliens admitted for permanent residence who have maintained lawful domicile in United States for seven consecutive years to continue residing in United States, in Attorney General's discretion, notwithstanding their deportability under other sections of Act. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C.A. § 1182(c).

[20] ALIENS ⇐53.10(1)
24k53.10(1)
Decision to grant waiver of deportability is within sole discretion of immigration judge. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C.A. § 1182(c).

[21] ALIENS ⇐54(4)
24k54(4)
Alien's lack of affidavits did not impinge upon fundamental fairness of deportation hearing or substantially prejudice him so as to give rise to due process violation; despite lack of affidavits outlining hardship, immigration judge assumed that deportation would adversely affect alien, and he then balanced adverse factors evidencing alien's undesirability as permanent resident with social and humane considerations presented in alien's behalf to determine whether to grant waiver of deportability. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C.A. § 1182(c).

[21] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Alien's lack of affidavits did not impinge upon fundamental fairness of deportation hearing or substantially prejudice him so as to give rise to due process violation; despite lack of affidavits outlining hardship, immigration judge assumed that deportation would adversely affect alien, and he then balanced adverse factors evidencing alien's undesirability as permanent resident with social and humane considerations presented in alien's behalf to determine whether to grant waiver of deportability. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C.A. § 1182(c).

[22] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Due process challenge requires showing of substantial prejudice to petitioning alien. U.S.C.A. Const.Amend. 5.

[23] CONSTITUTIONAL LAW ⇐274.3
92k274.3
To render deportation hearing unfair for due process purposes, defect or practice complained of must have been such as might have led to denial of justice or there must have been absent element deemed essential to due process. U.S.C.A. Const.Amend. 5.

[24] ALIENS ⇐54(4)
24k54(4)
Immigration judge's failure to inform alien of his right to submit affidavits from relatives in deportation hearing did not lead to denial of justice or due process. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C.A. § 1182(c).

[24] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Immigration judge's failure to inform alien of his right to submit affidavits from relatives in deportation hearing did not lead to denial of justice or due process. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C.A. § 1182(c).

[25] ALIENS ⇐53.9
24k53.9
Aliens, both legal and illegal, are entitled to constitutional protection of due process, equal protection, and reasonable bail. U.S.C.A. Const.Amend. 5.

[25] CONSTITUTIONAL LAW ⇐210(1)

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92k210(1)
Aliens, both legal and illegal, are entitled to constitutional protection of due process, equal protection, and reasonable bail. U.S.C.A. Const.Amend. 5.

[25] CONSTITUTIONAL LAW ⇐252
92k252
Aliens, both legal and illegal, are entitled to constitutional protection of due process, equal protection, and reasonable bail. U.S.C.A. Const.Amend. 5.

[26] ALIENS ⇐53
24k53
Legal aliens subject to deportation generally are granted greater substantive rights than are excludable aliens.

[27] ALIENS ⇐53.9
24k53.9
Indefinite detention of deportable aliens who are aggravated felons is statutorily authorized when immediate deportation is not possible and alien has not overcome presumption against his release.

[28] CONSTITUTIONAL LAW ⇐252
92k252
Fifth Amendment's mandate that no person shall be deprived of life, liberty, or property without due process of law extends due process protection to persons within territorial United States and not just to United States citizens. U.S.C.A. Const.Amend. 5.

[29] ALIENS ⇐53.9
24k53.9
Detention of alien pending deportation is properly analogized to incarceration pending trial or other disposition of criminal charge and, thus, is justifiable only as temporary measure.

[30] ALIENS ⇐53.9
24k53.9
Four year detention of legal alien who was under final order of deportation and who was aggravated felon was excessive and violated alien's right to substantive due process, although lengthy detention was due to Immigration and Naturalization Service's (INS) failure to find country to take him. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 242(a), as amended, 8 U.S.C.A. § 1252(a).

[30] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Four year detention of legal alien who was under final order of deportation and who was aggravated felon was excessive and violated alien's right to substantive due process, although lengthy detention was due to Immigration and Naturalization Service's (INS) failure to find country to take him. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 242(a), as amended, 8 U.S.C.A. § 1252(a).

*1014 Robert F. Barnard, Federal Public Defender, New Orleans, LA, for Kestutis Zadvydas.

Matilda Ann Baker, U.S. Immigration & Naturalization Service, New Orleans, LA, Kathryn Weekley Becnel, U.S. Atty.'s Office, New Orleans, LA, for John B.Z. Caplinger, Immigration and Naturalization Service.

ORDER AND REASONS

FALLON, District Judge.

Before this Court is petitioner Kestutis Zadvydas' objection to the report and recommendation of United States Magistrate Judge Louis Moore, Jr., which recommends that the petitioner's application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, be denied. For the reasons that follow, the petitioner's objection is sustained in part, in that the Court finds that the petitioner's detention pending deportation violates his right to substantive due process, and denied in part, in that it is denied in all other respects. The petition for writ of habeas corpus is GRANTED subject to the conditions hereinafter described.

I.
BACKGROUND:

The petitioner was born on November 21, 1948 in a displaced persons' camp in a region of Germany governed by the United States following World War II. His parents were from Lithuania but it is not clear whether either or both were ever citizens of that country. [FN1] In 1956, at the age of 8, petitioner was admitted to the United States in connection with a program for the relocation of displaced persons.

FN1. His mother denies ever being a Lithuanian citizen.

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On December 8, 1966 petitioner was convicted in the New York Supreme Court, Queens County, of attempted robbery, third degree. On February 7, 1974 he was convicted in New York Supreme Court, Kings County, for attempted burglary, third degree.

The Immigration and Naturalization Service (INS) issued an order to show cause on July 6, 1977 charging petitioner as deportable. On July 13, 1977 petitioner was granted release on his own recognizance and allowed to remain at large pending disposition of his deportation case.

In July 1982 the INS notified petitioner that his hearing before an immigration judge had been rescheduled to August 25, 1982. He failed to appear for his August hearing. He was not heard from for 10 years. INS sent registered letters to his last known address in an attempt to find him. Petitioner apparently moved and claims he never received the letters. During this decade he married, parented a child, was gainfully employed, filed income tax returns, and obtained an extension or reissuance of his immigration card (green card).

On August 17, 1992 petitioner was convicted in Circuit Court of Fairfax County, Virginia for a 1987 offense of possession of a controlled drug (Cocaine) with intent to distribute. Petitioner turned himself in to the police in Houston and was removed to Virginia where he faced the drug charges which *1015 led to his conviction. He was sentenced to serve 16 years with 6 years suspended. He served 2 years of his sentence and was released on parole in January 1994. He was immediately taken into custody by the INS and deportation proceedings were begun again. The INS detained the petitioner without bond based upon his aggravated felony conviction. A bond determination hearing was held and the Immigration Judge denied the petitioner's request for a change in status ordering that he remain in custody without bond. The Immigration Judge based this decision on the likelihood that the petitioner would fail to appear for future immigration hearings because of his prior history. The Board of Immigration Appeals (BIA) denied petitioner's appeal.

On March 29, 1994, petitioner's deportation hearing was held. He admitted all allegations and was found deportable. Seeking relief from deportation, the petitioner applied for a waiver under the Immigration and Nationality Act, which was denied on April 26, 1994. The petitioner was ordered deported from the United States to Germany.

In May of 1994, the INS Officer-in-Charge (OIC) in Oakdale, Louisiana began the petitioner's deportation which, as of today, has still not occurred. Although the petitioner immigrated from Germany and represented to the Immigration Judge he was a German citizen, the German government informed the INS that the petitioner is not a German citizen. Rather, he was born in a German holding camp; his parents were once residents of Lithuania. Lithuania has also denied the petitioner's citizenship. Thus, the petitioner is "stateless" and is being detained indefinitely since the INS is unable to find a country that will claim him. [FN2]

FN2. At the time of this writing the petitioner was still being held pending deportation. As of October 1997 the petitioner has been detained for three years and nine months.

The petitioner has applied to this Court for habeas corpus relief on grounds that his indefinite detention pending deportation is unconstitutional. The petitioner asserts the following arguments: 1) that he never made a knowing waiver of his constitutional rights, including his right to counsel; 2) that his detention violates international law; 3) that his detention violates due process; 4) that his detention is in effect one for life and thus violates the Eighth Amendment's prohibition against cruel and unusual punishment.

After a thorough review of the record, Magistrate Judge Louis Moore recommended that the petitioner's request for habeas corpus relief be denied. Judge Moore found that the continued detention of the petitioner was statutorily authorized and that the Attorney General did not abuse her discretion in detaining the petitioner. Judge Moore based his finding on the petitioner's prior failure to appear for his initial deportation proceeding and his prior convictions. In addition, Judge Moore found that the petitioner participated knowingly in his proceeding and that his waiver of his right to counsel was voluntary. Lastly, Judge Moore found that neither International Law nor the Eighth

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Amendment were violated. Because the INS' efforts to deport the petitioner remained ongoing, Judge Moore reasoned that the petitioner was not being arbitrarily imprisoned for an indefinite amount of time.

The petitioner now moves this Court to reconsider Judge Moore's report and recommendation under 28 U.S.C. § 636(b)(1)(C). Petitioner asserts that Judge Moore erred in finding that petitioner's original hearing comported with due process and in finding that petitioner's detention was constitutional. The INS urges its original arguments but also asserts that, because of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Judge Moore as well as this Court has no jurisdiction to review any claims stemming from the petitioner's deportation order.

II.
JURISDICTION OF THE COURT

Before considering the merits of this cause, it is incumbent on the Court to first address the jurisdictional issue.

[1] The Illegal Immigration and Reform and Immigrant and Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009, signed into law by President Clinton *1016 on September 30, 1996, entirely redefined the scope and/or availability of judicial review of immigration orders and decisions. Section 306 of the IIRIRA rewrote 8 U.S.C. § 1252 (§ 242 of the Immigration and Nationality Act) and provides limits on judicial review of immigration matters. Section 242(g) of the Immigration and Nationality Act ("INA"), as amended by IIRIRA, provides as follows:

> (g) EXCLUSIVE JURISDICTION. Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the Immigration and Nationality Act ("INA")].

See IIRIRA § 306. Most of the amendments to the INA made pursuant to the IIRIRA do not effect habeas corpus petitions filed prior to the effective date of April 1, 1997. Section 1252(g), however applies retroactively, "without limitation to claims arising from all past, pending or future exclusion, deportation or removal proceedings." Dorean Vayspitter v. United States General Attorney, 1997 WL 299372, *3 (E.D.La. June 3, 1997); IIRIRA section 306, as amended October 11, 1996 Pub.L. No. 104-302, 110 Stat. 3656, 3657.

Because of Section 1252(g), the Government contends that under the clear terms of § 242(g) of the INA, as amended by the IIRIRA, this Court lacks jurisdiction to entertain the petitioner's claims. In support of their contention, the government cites two recent decisions, Yang v. I.N.S., 109 F.3d 1185 (7th Cir.1997) and Safarian v. Reno, 968 F.Supp. 1101 (E.D.La. 1997). In Yang, the Seventh Circuit held that under § 242(g) the district courts are precluded from exercising jurisdiction over deportation-related matters pursuant to 28 U.S.C. § 2241 or any other provision of law. In so holding, the Yang court emphasized that, "Congress wanted to expedite the removal of criminal aliens from the United States by eliminating judicial review, not to delay removal by requiring aliens to start the review process in the district court rather than the court of appeals." Yang, 109 F.3d at 1195. Next, the government cites Safarian, supra, in which the United States District Court for the Eastern District of Louisiana held that, "the express provisions of the IIRIRA clearly remove jurisdiction under any statute, including a right to habeas corpus under § 2241." According to the Government, only by divesting the federal courts of the power to review agency decisions through the writ of habeas corpus will the "streamlined appeal and removal process" intended by Congress be achieved. H.Rep. No. 104-469(I), 104th Cong., 2d Sess. 359, 463 (1996) (reproduced at 1996 WL 168955).

In his supplemental memorandum on jurisdiction the petitioner argues that this Court has the power to review through the writ of habeas corpus. Despite the enactment of the IIRIRA, the petitioner maintains that this Court retains habeas corpus jurisdiction under 28 U.S.C. § 2241 or Art. I, § 9, cl. 2 of the Constitution. The petitioner contends that this Court has habeas jurisdiction under 28 U.S.C. § 2241 because § 242(g) of the INA, as amended by the IIRIRA, does not effectively eliminate this habeas review. In the alternative, the petitioner contends that even if the IIRIRA validly eliminates the federal courts' habeas review under 28 U.S.C. § 2241, review is nevertheless available

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under the constitutional writ, unaided by statute.

A. History of Habeas Corpus

It is appropriate at this point to review the historical development of habeas corpus. The history of the right of personal liberty began before the writ of habeas corpus originated. The right was granted, at least to some English subjects, by Article 39 of Magna Carta, which provided that no free man should be arrested, imprisoned, or destroyed except by the judgment of his peers or by the law of the land. Magna Carta, Art. 39. The essence of this article has been traced back through English law books of the Twelfth Century to documents of the Holy Roman Empire of the Eleventh Century. Richard L. Perry and John C. Cooper, Sources of Our Liberties, p. 5 (1978). Although there has been scholarly dispute on *1017 the subject, as early as the Fourteenth Century the "law of the land" provision was considered to be the equivalent of "due process of law". Richard L. Perry and John C. Cooper, Sources of Our Liberties, p. 189 (1978); William S. Hollsworth, A History of English Law, 4th ed., Vol. 1, pp. 60-63 (1931). In addition, the protection of this provision was extended to all citizens and not just to the "freemen" who were a limited group of land barons. William S. Holdsworth, A History of English Law, Vol. 1, p. 227 (4th ed. 1931); Ex Parte Yerger, 75 U.S.(8 Wall.) 85, 96, 19 L.Ed. 332 (1868).

In America the Colonist claimed the writ as one of the "rights of Englishmen" to which they were entitled under their charters and by reason of the common law. As a result, the privilege of the writ of habeas corpus was incorporated into the constitutions adopted by the states at the time of the American Revolution. See, e.g., Constitution of Pennsylvania, Art. IX (1776). Constitution of Maryland, Art. XXI (1776).

B. Habeas Corpus Protected by Constitution

Habeas corpus is referenced in the Constitution of the United States. Because the writ of habeas corpus plays such a central role in protecting individual liberty, the framers provided in Art. 1, § 9, cl. 2 of the Constitution that "the privilege of the Writ of Habeas Corpus shall not be suspended [except during times of rebellion]."

C. Habeas Jurisdiction Under Statute

In addition to the specific reference in the Constitution, the writ has also been granted by statute. The federal courts have had the power to grant writs of habeas corpus since enactment of the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82 (the "1789 Act"). In 1867, Congress expanded the Supreme Court's statutory appellate jurisdiction while also expanding the power of the federal courts to issue writs of habeas corpus, permitting the issuance of such writs "in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States." Yesil v. Reno, 958 F.Supp. 828, 1997 WL 86391 (S.D.N.Y. Feb. 27, 1997) (citing Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (the "1867 Act.")) The current version of the Habeas Act is found in 28 U.S.C.A. §§ 2241-2255.

[2] Section 2241 of Title 28 of the United States Code establishes federal courts' power to grant the writ of habeas corpus. It provides, in part, that:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district court and any circuit judge within their respective jurisdictions
> ....
> (c) The Writ of habeas corpus shall not extend to a prisoner unless--
> (1) He is in custody under the color or by color of the authority of the United States or
> ....
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States
> ....

28 U.S.C. § 2241(a), (c)(1), (c)(3). Section 2241 is the direct descendant of Section 14 of the Judiciary Act of 1789 and the 1867 Act, which expanded the scope of the writ. See Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82; Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. Under Section 2241 habeas corpus will lie to protect the fundamental liberties guaranteed under the Constitution. Benziane v. U.S., 960 F.Supp. 238 (D.Colo.1997).

The petitioner argues that his access to this judicial review should not be restricted because there is not sufficient "clear and convincing evidence" that the IIRIRA repeals the district court's habeas corpus review under 28 U.S.C. § 2241. His argument is based on the principle espoused by the Supreme

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Court in Abbott Labs. v. Gardner, 387 U.S. 136, 140-41, 87 S.Ct. 1507, 1510- 11, 18 L.Ed.2d 681 (1967). In Abbott Labs, the Supreme Court adopted a presumption of reviewability which it derived from the structure of the Administrative Procedure Act: "[T]he Administrative Procedure Act ... embodies the basic presumption of judicial review.... [*1018 O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should courts restrict access to judicial review."

Almost one-hundred thirty years ago, and again last year, the Supreme Court explicitly admonished that Congressional intent to repeal habeas jurisdiction must be express and that "[r]epeals by implication are not favored." Felker v. Turpin, 518 U.S. 651, ----, 116 S.Ct. 2333, 2338, 135 L.Ed.2d 827 (1996); see also Ex Parte Yerger, 75 U.S.(8 Wall.) 85, 105, 19 L.Ed. 332 (1868). In both Felker and Yerger the Court refused to read jurisdiction modifying statutes enacted by Congress as repealing other avenues of habeas jurisdiction that had not been specifically abrogated, much less mentioned, by those jurisdiction modifying statutes. "Only upon a clear statement can a court conclude that Congress meant to repeal an independent avenue of habeas jurisdiction." Mojica v. Reno, 970 F.Supp. 130 (E.D.N.Y.1997). Such a clear statement is absent from the governing statute in the present case.

The Government points to the phrase "notwithstanding any other provision of law, no court shall have jurisdiction..." In § 242(g) of the INA, as amended by IIRIRA, as evidence that Congress intended to eliminate the district courts' recognized jurisdiction under 28 U.S.C. § 2241. They assert that this is "clear and convincing evidence" that Congress repealed the district courts' power to hear habeas corpus claims of any person in custody, including deportable aliens.

On this point the Court finds helpful the reasoning of the District Court for the District of Columbia in Ozoanya v. Reno, 968 F.Supp. 1 (D.D.C.1997), a case addressing the issue of whether 28 U.S.C. § 2241 remains a viable basis for habeas jurisdiction after the enactment of the IIRIRA. In Ozoanya, the United States District Court for the District of Columbia held that, the district courts jurisdiction to hear claims brought by deportable aliens under 28 U.S.C. § 2241 survives the 1996 amendments to the INA. In so holding the court stated:

> It follows from Felker that if Congress had intended to eliminate the district courts' jurisdiction under 28 U.S.C. § 2241 to consider habeas corpus petitions filed by a certain class of persons in custody, it would have had to do so affirmatively and clearly. There is nothing in the language of ... the IIRIRA to suggest that Congress expressly repealed Section 2241, limited its scope or eliminated the jurisdiction of the district courts under that statute to consider petitions for writs of habeas corpus....
> The language of ... the IIRIRA is "at best ambiguous" it "[does] not state that they repeal or amend section 2241; indeed they do not mention section 2241 at all." Yesil v. Reno, 958 F.Supp. 828, 838 (S.D.N.Y.1997).

Ozoanya, 968 F.Supp. At 6-7.

In Mojica v. Reno, supra, the United States District Court for the Eastern District of New York also found that the general habeas statute at 28 U.S.C. § 2241 continues to provide a jurisdictional basis for relief from deportation orders. Mojica, 970 F.Supp. 130 (E.D.N.Y.1997). In an opinion that supplements Ozoanya, the Mojica court stated:

> Congress is expert in the process of lawmaking. Had it desired to repeal section 2241, or render it inapplicable to challenges to deportation orders, it would have taken the necessary steps to do so. It must be presumed that Congress was mindful of the necessity for a clear statement to that effect. Congress is presumed to know the law. As the Felker Court acknowledged, Congress knows how to repeal habeas jurisdiction. Where it intended to do so, it states that intention expressly. See, Felker v. Turpin, 518 U.S. 651, —, 116 S.Ct. 2333, 2338, 135 L.Ed.2d 827 (1996).

Mojica, 970 F.Supp. at 160 (citations omitted).

The Mojica court also referred to findings relating to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (1996), the statutory predecessor to the IIRIRA. The AEDPA, like IIRIRA, also contained a section which attempted to withdraw habeas corpus *1019 jurisdiction by all courts. Like the IIRIRA, the AEDPA did not expressly purport to modify section 2241. Yesil, 958 F.Supp. 828 (S.D.N.Y.). The Mojica Court, to provide further support for their holding, pointed out that district courts addressing the AEDPA's effect on § 2241

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"have been almost unanimous in their agreement that § 2241 is available and has not been repealed." Mojica, 970 F.Supp. At 161, [citing Yesil, 958 F.Supp. 828 (S.D.N.Y.1997); Eltayeb v. Ingham, 950 F.Supp. 95 (S.D.N.Y.1997); Duldulao v. Reno, 958 F.Supp. 476 (D.Haw.1997); Dunkley v. Perryman, 1996 WL 464191 (N.D.Ill.1996); Mbiya v. INS, 930 F.Supp. 609 (N.D.Ga.1996)]. Essentially, all these courts found that § 2241 was still available despite the enactment of the AEDPA, because the latter did not expressly repeal § 2241. Because the AEDPA and the IIRIRA basically contained the same jurisdictional withdrawal provision, the Court in Mojica utilized this logic in analyzing the effect of IIRIRA on § 2241 jurisdiction. By doing so it came to the conclusion stated earlier that, in the wake of the IIRIRA, section 2241 remains a viable basis for habeas jurisdiction. Mojica, 970 F.Supp. At 159-163.

[3] This Court agrees with the reasoning of both the Ozoanya and Mojica courts. Because the IIRIRA does not amend, or even mention, section 2241 of Title 28, the Court cannot conclude that Congress repealed § 2241 by implication. In order to have effectively repealed this statute Congress would have had to say so explicitly. It must be remembered that "[c]ourts do not have to resort to divining phantom or unarticulated Congressional intentions to repeal habeas jurisdiction from the void of statutory silence." Mojica, 970 F.Supp. at 160. Furthermore, if the Court were to find that the statute was repealed, the Court arguably would be violating the Suspension Clause of the Constitution. See Art. I, § 9, cl. 2; Mbiya, 930 F.Supp. at 612 ("Any attempt by Congress to restrict this sphere of authority necessarily would create constitutional difficulties not only with respect to the Suspension Clause, but also with respect to the Constitution's delineation of authority between the branches of the government").

D. Continued Viability of Habeas Corpus

In summary, from a historical and jurisprudential perspective, it is clear that the great writ still has vitality and that this court has jurisdiction. The suggestion that the IIRIRA bars all habeas corpus review must be rejected. See Yang v. INS, 109 F.3d 1185, 1194-97 (7th Cir.1997); Boston-Bollers v. INS, 106 F.3d 352, 355 (11th Cir.1997); Williams v. Immigration & Naturalization Service, 114 F.3d 82, 84 (5th Cir.1997). In the present case, however, it is necessary to explore whether this petitioner, a non citizen legal alien, fits within the scope of this concept.

III.
Scope of Habeas Review

[4] "Habeas Corpus review under § 2241 [or as contemplated by art. 1, section 9 of the Constitution] is justified if an alien subject to an order of deportation based on violation of crimes enumerated by Congress demonstrates some grave constitutional error or a fundamental miscarriage of justice." Mbiya, 930 F.Supp. 609, 612 (N.D.Ga.1996); See also, Yesil, 958 F.Supp. 828 (S.D.N.Y.1997); Eltayeb, 950 F.Supp. 95 (S.D.N.Y.1997). With the enactment of the IIRIRA, Congress evidenced its desire to expedite the deportation of criminal aliens and to restrict all judicial review of final orders of deportation to the greatest extent possible. Thus, in determining the scope of habeas review, courts have concluded that review should be limited to those situations in which deportation would result in a fundamental miscarriage of justice. Id. The rationale for this narrow scope of review is that it "is necessary to accommodate the balance between an alien's constitutional right to habeas review and Congress' power over matters of immigration." Eltayeb, 950 F.Supp. at 99. Hence a court should grant relief to the petitioner only if he demonstrates some grave constitutional error or a fundamental miscarriage of justice. Accordingly, the Court will analyze the petitioner's claims under this narrow standard of review.

*1020 A. Procedural Due Process Claims–Deportation Hearing

The Court will first address the petitioner's claim that his deportation hearing was in violation of his right to due process. Specifically, the petitioner claims that the deportation hearing violated procedural due process and fundamental fairness because the petitioner never made a knowing waiver of his constitutional rights. The petitioner contends that because he was never told by the Immigration Judge that he could be detained for an indefinite period of time as a result of the deportation hearing, he waived several important rights and made a number of significant admissions, such as electing not to obtain an attorney and admitting he was a

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German citizen. He also contends that he was never told by the Immigration Judge that his relatives' interest would be one of the principal determining factors in the outcome of the case. Furthermore, he was never asked by the Immigration Judge if he could obtain affidavits from his relatives expressing their interest. Accordingly, the petitioner contends that his right to call such witnesses and produce affidavits was waived unknowingly.

Aliens within this country who face expulsion are entitled to the procedural safeguards of due process. As the Supreme Court has held, "once an alien gains admission to a country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly." Landon v. Plasencia, 459 U.S. 21, 32-33, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982). "The Supreme Court has frequently suggested that a continuously present alien is entitled to a fair hearing when threatened with deportation, and, has developed the rule that a continuously present permanent resident alien has a right to due process in such a situation." Id.

[5][6] The Due Process Clause of the Fifth Amendment provides that "[n]o person ... shall be deprived of life, liberty, or property without due process of law...." It protects individuals against two types of government action. "Substantive Due Process" prevents the government from engaging in conduct that "shocks the conscience," [FN3] or interferes with rights "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325-26, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). "Procedural Due Process" ensures that government action depriving a person of life, liberty, or property is implemented in a fair manner. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

FN3. Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952).

[7][8] As stated above, "the Fifth Amendment entitles aliens to due process of law in deportation proceedings." Reno v. Flores, 507 U.S. 292, 306, 113 S.Ct. 1439, 1449, 123 L.Ed.2d 1 (1993). Accordingly, the Immigration Judge must conduct deportation hearings in accord with the standards of due process. Olabanji v. I.N.S., 973 F.2d 1232, 1234 (5th Cir.1992). If the deportation hearings are not conducted properly, a due process violation exists when the defect impinges "upon the fundamental fairness of the hearing in violation of the Fifth Amendment, and there existed substantial prejudice." Ogbemudia v. I.N.S., 988 F.2d 595, 598 (5th Cir.1993).

1. Petitioner's waiver of right to counsel

[9] Although Congress has provided by statute that an alien has a right to obtain counsel at his own expense, an alien does not have a Sixth Amendment right to counsel in an immigration proceeding. Thus, "any right an alien may have in this regard is grounded in the fifth amendment guarantee of due process rather than the sixth amendment right to counsel." Barthold v. U.S. Immigration and Naturalization Service, 517 F.2d 689 (5th Cir.1975).

[10][11][12] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), established the "totality of circumstances approach" for reviewing waiver of Fifth Amendment rights. In order for a waiver of right to counsel to be valid it must be made knowingly and intelligently. Molignaro v. Smith, 408 F.2d 795 (5th Cir.1969). Thus if petitioner's waiver of counsel was not made knowingly or intelligently, then the Immigration Judge's acceptance of it could constitute *1021 a due process violation if it impinged "upon the fundamental fairness of the hearing in violation of the Fifth Amendment" and resulted in substantial prejudice. Ogbemudia, 988 F.2d at 599. The determination of whether a waiver of the right to counsel has been made knowingly and intelligently depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

[13] The petitioner likens his waiver of rights in the administrative hearing to those waived by a criminal defendant in a guilty plea. The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 369, 88 L.Ed.2d 203 (1985). The petitioner contends that he did not knowingly waive his right to counsel at the deportation hearing because the Immigration Judge did not inform him

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that a result of the hearing could be prolonged detention. After review and study of the administrative record, the United States Magistrate Judge found that the petitioner, despite the claimed defect, knowingly and intelligently waived his right to counsel. This Court agrees.

[14] Having reviewed the record in light of the "totality of the circumstances," the Court is convinced that the petitioner's waiver of counsel during the deportation hearing was constitutionally valid and that there was no fundamental unfairness in the Immigration Judge's acceptance of this waiver. Therefore, the petitioner was not deprived of due process. First, the petitioner should have known about the value of counsel in legal proceedings due to his extensive first hand knowledge of the criminal justice system. Secondly, he was specifically told that he had a right to counsel and was advised about the ramifications and possible consequences of his admissions. This factor alone is sufficient to support a finding that there was not a denial of due process. Barthold, 517 F.2d 689 (5th Cir.1975).

[15][16][17] The Court does not agree with the petitioner that the Immigration Judge had a duty to inform him, that if found deportable he could be detained while awaiting deportation. The nature of a deportation hearing is civil in nature. Ramirez-Osorio v. I.N.S., 745 F.2d 937 (5th Cir.1984). "Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation." INS v. Lopez-Mendoza, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984). Thus, a waiver of counsel in a deportation hearing need not be "made with an apprehension of ... the range of allowable punishments thereunder, ... and all other facts essential to a broad understanding of the matter." Von Moltke v. Gillies, 332 U.S. 708, 724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (1948). In short, the petitioner has failed to present any authority for his argument that an Immigration Judge in a deportation proceeding must inform the alien of all the possible consequences that might result from a finding of deportability. Accordingly, the Court finds the fact the Immigration Judge failed to inform the petitioner of the possibility of prolonged detention did not alter the fact that the waiver of counsel was made knowingly. Hence, the deportation hearing was conducted in accordance with the requirements of due process and fundamental fairness.

2. Petitioner's lack of affidavits and admissions that he was a Citizen of Germany

The second prong of the petitioner's due process claim, is that his lack of attorney prejudiced him at the deportation hearing. As such the petitioner believes that the deportation hearing was unfair and did not comport with the requisites of procedural due process. Specifically, the petitioner contends that the lack of affidavits from his relatives and his conclusion that he was a German citizen interfered with his chance to obtain Section 212(c) relief of the Immigration Act. Accordingly, the petitioner contends that his right to due process of the law was violated.

[18][19] Under Section 212(c) of the Immigration and Nationality Act, aliens admired *1022 for permanent residence who have maintained a lawful unrelinquished domicile in the United States for seven consecutive years, may in the Attorney General's discretion, be permitted to continue residing in the United States notwithstanding their deportability under other sections of the Act. Ashby v. I.N.S., 961 F.2d 555 (5th Cir.1992). Section 212(c) does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Id. Rather, the petitioner bears the burden of demonstrating that his request for a waiver warranted favorable consideration. Further, "because section 212(c) does not provide standards governing how the Board's discretion should be exercised, the Attorney General has unusually broad discretion in granting and denying waivers." Id.

[20] In order to provide the framework for an equitable application of discretionary relief, the Board has enunciated factors relevant to the issue of whether § 212(c) relief should be granted as a matter of discretion:

> Among the factors deemed adverse to a respondent's application have been the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as permanent resident of this country.

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Matter of Marin, 16 I & N Dec. 581, 584-85 (BIA 1978). The decision to grant § 212(c) relief is within the sole discretion of the Immigration Judge.

The AEDPA and the IIRIRA both evidence Congress' intent to preclude from review those matters particular to the agency's discretion and expertise--i.e., matters involved in determinations of deportability. Anwar v. I.N.S., 107 F.3d 339, 342 (5th Cir.1997). The petitioner, however, does not ask this Court to review the decision of the Immigration Judge to deny discretionary relief. Rather, the petitioner is seeking review of certain procedural aspects of the hearing at which the Immigration Judge decided not to grant discretionary relief under § 212(c). Accordingly, the petitioner's challenges are reviewable by this Court for the purpose of determining whether the hearing was conducted in accordance with due process.

a. Lack of Affidavits

The petitioner's alleged due process violation is that he was never told that he, pursuant to § 212(c), could provide affidavits at the hearing in support of his application for § 212(c) relief. Accordingly, the petitioner contends that this defect rendered the hearing unfair and that he was substantially prejudiced thereby. The Board of Immigration Appeals has set forth several "favorable considerations" on which the alien may "present [ ] evidence in support of a favorable exercise of discretion" under § 212(c):

> Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country ..., evidence of hardship to the respondent and family if deportation occurs, ..., a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives).

Matter of Marin, 16 I & N Dec. at 584-85 (citation omitted). The petitioner argues that his right to due process of the law was violated by the Immigration Judge failing to inform him that he could provide affidavits and then basing the decision to deny § 212(c) relief on a lack of such affidavits.

[21][22][23] The Court finds that the petitioner's lack of affidavits did not "impinge upon the fundamental fairness of the hearing in violation of the Fifth Amendment," or substantially prejudice the petitioner. Ogbemudia, 988 F.2d at 595 (5th Cir.1993). First, a due process challenge requires a showing of substantial prejudice to the petitioning alien. Hernandez-Garza v. INS, 882 F.2d 945 (5th Cir.1989). Also, "to render a hearing unfair, the defect or practice complained of must have been such as might have led to a denial *1023 of justice, or there must have been absent an element deemed essential to due process." Animashaun v. Immigration and Naturalization Service, 990 F.2d 234, 238 (5th Cir.1993).

The petitioner, however, contends that his due process rights were violated because the Immigration Judge made the lack of affidavits a key factor in deciding whether to grant § 212(c) relief. Essentially the petitioner contends that had he been informed of his right to provide affidavits from his relatives indicating they would suffer emotional hardship if he were deported, he would have done so. According to the petitioner, these affidavits would have persuaded the Immigration Judge to grant relief under § 212(c). Thus, the petitioner contends that he was substantially prejudiced by his lack of affidavits. The Court disagrees.

The Immigration Judge, despite the lack of affidavits outlining hardship, assumed that deportation would adversely effect the petitioner and his relatives. He then "balance[d] the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether granting section 212(c) relief appear[ed] in the best interests of this country." Matter of Marin, 16 I & N Dec. at 584-85. Balancing these factors, the Immigration Judge found that the extreme hardship the petitioner and his family would suffer if he was deported was one of the most positive equities weighing in his favor. The effect that the petitioner alleges the affidavits would have had on the deportation hearing was achieved when the Immigration Judge assumed that the deportation would cause extreme hardship. Thus, the lack of affidavits did not prejudice the petitioner.

[24] Moreover, the court finds no fundamental unfairness in the deportation hearing because the petitioner cannot point to anything in § 212(c) that required the Immigration Judge to inform him of his right to submit affidavits from relatives. Had the petitioner retained counsel, it would have been the obligation of the attorney to inform him of this right. However, the Immigration Judge was not the petitioner's counsel. Thus, the Immigration Judge's failure to inform the petitioner of his right to submit affidavits from relatives did not lead to a denial of justice. Hence, the petitioner's original deportation hearing was fair and comported with the requisites of due process.

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b. Petitioner's Admission that he was a German Citizen

The petitioner also contends that the immigration judge mistakenly believed he was a German citizen. According to petitioner, had the Immigration Judge realized he had no country that would claim him as a citizen, the Immigration Judge would have granted him relief under § 212(c). Thus, he contends that the deportation hearing was constitutionally flawed. The Court disagrees.

The Immigration Judge did not deny § 212(c) relief simply because he believed that the petitioner was a German citizen. Section 212(c) relief was denied because of the petitioner's past criminal history and his prior episode of "bond jumping." The fact that the petitioner claimed he was a German citizen played only an insignificant part, if any, in the Immigration Judge's decision to deny § 212(c) relief. On page 14 of his Motion and Incorporated Memorandum to Review the Magistrate's Report and Recommendation, the petitioner even admits that the conclusion was innocuous. Accordingly, this Court finds that the Immigration Judge's finding as to the petitioner's citizenship did not substantially prejudice the petitioner, or render his hearing fundamentally unfair.

B. Substantive Due Process Claim--Detention pending Deportation

The petitioner claims that his continued detention pending deportation violates his Fifth Amendment right to substantive due process. In arguing that the length of his detention (a denial of petitioner's asserted liberty interest) "shocks the conscience," the petitioner focuses on the substantive nature of the alleged constitutional violation.

Narrowly framed, the issue before this Court is whether a legal alien who is under a final order of deportation may be permanently *1024 incarcerated because the INS cannot find a country to take him. The Court must determine whether such detention is beyond permissible constitutional limitations. Tran v. Caplinger, 847 F.Supp. 469 (W.D.La.1993).

1. Statutory Authority

[25][26] It is necessary to note that control over matters of immigration and naturalization is the "inherent and inalienable right of every sovereign and independent nation." Fong Yue Ting v. U.S., 149 U.S. 698, 711, 13 S.Ct. 1016, 1021, 37 L.Ed. 905 (1893). Under the United States Constitution, such control is vested in the political branches of government. See U.S. Const., art. 1, § 8, cl.4. Congressional power in their area is plenary, subject to only limited judicial review. See Fiallo v. Bell, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977). In exercising its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens." Mathews, 426 U.S. at 80, 96 S.Ct. at 1891. Nonetheless, aliens both legal and illegal, are entitled to the constitutional protection of due process, equal protection and reasonable bail. Id. Also, legal aliens subject to deportation--the category in which petitioner falls-- generally are granted greater substantive rights than are excludable aliens. Landon, 459 U.S. at 26-27, 103 S.Ct. at 325-26. With this in mind, the Court will review the petitioner's detention to determine whether it is violative of his substantive due process rights.

At the outset, the Court notes that petitioner is properly classified as a convicted aggravated felon because of his controlled substance violation. True, the petitioner has served his sentence and hence paid his debt to society, but that fact does not alter this status. See, 8 U.S.C. § 1101(a)(43). Petitioner does not challenge this finding.

The INA authorizes the Attorney General on behalf of the INS to take an alien into custody pending deportation. See generally, 8 U.S.C. § 1252. Section 1252(a)(2)(A) of the Act specifically provides for the detention of aggravated convicted felons, as follows:

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The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) but subject to subparagraph (B), the Attorney General shall not release such felon from custody.

Paragraph (B) then provides:

The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

Section 1252(a)(2) creates a rebuttable presumption against the release of any alien who is convicted of an aggravated felony. See Matter of Ellis, 1993 WL 65657 (BIA 1993). Detention is required by 8 U.S.C. § 1252(a)(2)(A) unless the alien can rebut the presumption by successfully meeting the burden of proof set forth in 8 U.S.C. § 1252(a)(2)(B). Deportable aliens, convicted of aggravated felonies, who are lawfully admitted have an opportunity to overcome the presumption against their release by presenting favorable evidence to an Immigration Judge in an individual bond hearing. In order to be eligible for release, an alien convicted of an aggravated felony must show that he is lawfully admitted, that he is not a threat to the community, and that he is likely to appear at any scheduled hearings. 8 U.S.C. § 1252(a)(2)(B).

In this case, petitioner has established that he was lawfully admitted to this country; as to the other two requirements, however, petitioner has not met his burden of proof. Considering petitioner's recidivist history and his prior episode of "bond jumping," petitioner has not met his burden of proving that he is not a threat to the community and that he is likely to appear for scheduled hearings. [FN4]

FN4. The petitioner has received a discretionary bond redetermination based entirely on the recent enactment and invocation of the superseding Transitional Custody Rules of the IIRIRA. The Transition Period Custody Rules replaced the amendments made by section 440(c) of the AEDPA. Aliens who, like the petitioner, are deportable for having been convicted of an aggravated felony or a controlled substance violation may be released if:

"(I) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding."

See Section 303(b)(3)(B) of the IIRIRA. Consequently, in compliance with the Transitional Custody Rules, INS has interviewed the petitioner and has reviewed his file. Again, the INS has decided not to release the petitioner because he has not met his burden of proving that he is not a threat to the community and that he is likely to appear for scheduled hearings.

*1025 According to the language of 8 U.S.C. § 1252(a)(2)(A) detention is clearly mandated for aggravated felons who have not overcome the presumption against their release. See 8 U.S.C. § 1252. The language of 8 U.S.C. § 1252(a)(2)(B) and the Transitional Custody rules of the IIRIRA also contain language which supports mandatory detention. Additionally, nowhere in the relevant statute does Congress place a time limit on the detention. In Tran v. Caplinger, 847 F.Supp. 469 (W.D.La.1993), the District Court for the Western District of Louisiana stated:

> Congress has made provisions for expediting deportation proceedings of aliens who are convicted of committing aggravated felonies. See 8 U.S.C. § 1252(a). However despite efforts to expeditiously deport aggravated felons, there are times when circumstances beyond the control of the Attorney General and her agents make immediate deportation impracticable, unadvisable, or impossible. When such delays occur, Congress has not expressly limited the power of the Attorney General to detain such aliens. Neither section 1252(a)(2) nor section 1252(a) places a time limit upon the period of detention. Clearly, Congress knows how to place time limits upon the period of detention if they had chosen to do so. See 8 U.S.C. § 1252(c).

[27] Consequently, the mandatory language and the absence of a time limit on detention leads this Court to conclude that "indefinite detention of deportable aliens who are aggravated felons is statutorily authorized when immediate deportation is not possible and the alien has not overcome the presumption against his release." Tran, 847 F.Supp. at 474. See, also, Palma v. Verdeyen, 676 F.2d 100 (4th Cir.1982); Gisbert v. U.S. Atty. Gen., 988 F.2d 1437 (5th Cir.1993).

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2. Constitutional Challenge

This Court agrees with the Court in Tran, that "[w]hile there is statutory authority allowing indefinite detention of an alien who is classified as an aggravated felon under immigration law where the alien is unable to overcome the presumption which is established by 8 U.S.C. § 1252(a)(2), it is unclear how long this detention can continue without becoming violative of an alien's constitutional rights." Thus, "it is necessary for this Court to analyze the Petitioner's detention in light of his constitutional challenge to determine whether Petitioner's detention has continued beyond permissible constitutional limitations." Id.

[28] At the outset this Court again notes that the Fifth Amendment's mandate that "no person shall ... be deprived of life, liberty, or property, without due process of law" extends due process protection to persons within the territorial United States and not just to U.S. citizens. See Plyler v. Doe, 457 U.S. 202, 210-12, 102 S.Ct. 2382, 2391-92, 72 L.Ed.2d 786 (1982); Wong Wing v. United States, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140 (1896). Thus, the petitioner is entitled to have his detention reviewed by this Court to make sure it comports with the notions of due process.

The constitutionality of the detention must be considered in light of its purpose. The Fifth Circuit has indicated that the focus must be on "whether the detention is imposed for the purpose of punishment or whether it is merely incidental to another legitimate governmental purpose." Gisbert v. United States Attorney General, 988 F.2d 1437, 1441 (5th Cir.1993), citing Schall v. Martin, 467 U.S. 253, 268-69, 104 S.Ct. 2403, 2412, 81 L.Ed.2d 207 (1984). Absent "any expression of intent to punish on the part of *1026 the government, that determination will generally turn on 'whether an alternative purpose to which [the detention] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].' " Id. at 1441-42, citing Schall, 467 U.S. at 268-69, 104 S.Ct. at 2411-12.

The legislative history and text of Section 1252 clearly shows that Congress did not contemplate permanent detention as a means of punishment for aliens convicted of aggravated felonies who have already served their sentence. Tran, 847 F.Supp. at 474. Section 1252(a)(2)(B) of the INA and § 303(b)(3)(B) of the IIRIRA provides for the release of a lawfully admitted alien who has been convicted of an aggravated felony where the alien has demonstrated that he is neither a threat to others nor a flight risk. Thus, the purpose behind detention of these aliens is to protect the community from aggravated felons and to prevent aliens from absconding before deportation can be accomplished. Id., Caballero v. Caplinger, 914 F.Supp. 1374 (E.D.La.1996). Accordingly, the question of whether petitioner's detention complies with substantive due process ultimately turns on whether the detention in petitioner's case is excessive in relation to these goals.

The court in Tran determined that continued detention of a non-excludable alien under § 1252 pending deportation is not an excessive means of accomplishing the government's purpose. Tran, 847 F.Supp. 469. The Tran court recognized the heightened interest of Congress in immigration matters and noted that the INS had limited application of § 1252(a)(2) detention to those aliens who have already been judicially determined to have committed a felony. Id. at 475. The Court also notes that in Gisbert the Fifth Circuit using essentially the same rationale as the court in Tran found that the continued detention of an excludable alien pending deportation was not an excessive means of accomplishing the purposes sought to be served by § 1252(a). See also Caballero, 914 F.Supp. at 1374.

It is clear that protecting the community from aggravated felons and preventing aliens from absconding before deportation are legitimate governmental policy goals that, "can warrant a deprivation of liberty under the proper circumstances." U.S. v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

[29] The particularly troublesome aspect of the petitioner's detention is its duration to date and its potential, if not certainty, for indefinite duration in the future. Detention is intended for the sole purpose of effecting deportation, and once it becomes evident that deportation is not realizable in

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the future, the continued detention of the alien loses its raison d'etre. If there is nowhere to send the alien, then indefinite detention is no longer a temporary measure in the process of deportation; it is permanent confinement. "Detention pending deportation seems properly analogized to incarceration pending trial or other disposition of a criminal charge, and is, thus justifiable only as a temporary measure." Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir.1981).

Federal circuit and district courts have long held that deportable aliens in custody for more than a few months must be released because such detention becomes imprisonment. For example, in Petition of Brooks, 5 F.2d 238, 239 (D.Mass.1925) the court declared:

"The right to arrest and to hold or imprison an alien is nothing but a necessary incident of the right to exclude or deport. There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as punishment for a crime. Slavery was abolished by the Thirteenth Amendment. It is elementary that deportation or exclusion proceedings are not punishment for a crime.... He is entitled to be deported or to have his freedom."

and, in United States ex rel. Ross v. Wallis, 279 F. 401, 403-04 (2d Cir.1922), the court stated:

"... we therefore express an opinion that unless this relator, or any other person similarly situated, be actually deported within four months after such alien has exhausted his legal remedies, any further *1027 or other detention under pretense of awaiting opportunity would amount, and will amount, to an unlawful imprisonment, from which relief may be affected by a new habeas corpus."

Thus, courts have not hesitated to condemn the detention of an alien whenever it has appeared, following the lapse of a reasonable time, that his deportation was impossible or could not be effected in the foreseeable future. See U.S. ex rel. Kusman v. District Director of Immigration and Naturalization at Port of New York, 117 F.Supp. 541 (S.D.N.Y.1953); U.S. ex rel. Ross v. Wallis, 279 F. 401 (2d Cir.1922); Caranica v. Nagle, 28 F.2d 955 (9th Cir.1928); Wolck v. Weedin, 58 F.2d 928 (9th Cir.1932); In re Hanoff, 39 F.Supp. 169 (D.Cal.1941); U.S. ex rel. Janavaris v. Nicolls, 47 F.Supp. 201 (D.Mass.1942). The United States District Court for the District of Kansas stated that:

"The rationale underlying these decisions was that detention was intended for the sole purpose of effecting deportation. Once it has become evident that deportation was not realizable in the foreseeable future, the continued detention was found to be without cause."

Fernandez v. Wilkinson, 505 F.Supp. 787, 792 (D.Kan.1980). Courts have held that approximately two to four months was a reasonable period to detain an alien pending deportation efforts. Id. In the wake of these holdings, Congress enacted 8 U.S.C. § 1252(c), which gave the Attorney General six months in which to accomplish the aliens departure. [FN5] Although, the section has been repealed it does exhibit that at one point in time Congress disapproved of detention beyond the reasonable time necessary to execute a final order of deportation.

FN5. 8 U.S.C. § 1252(c) stated in pertinent part as follows:

Final Order of Deportation; place of detention.

When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or is judicial review is had, then from the date of the final order of the court within which to effect the alien's departure from the United States, during which period at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other conditions as the Attorney General may prescribe.

[30] Based upon the rationale above, this Court finds that the petitioner's detention of nearly four years with no end in sight, and the probability of permanent confinement, is an excessive means of accomplishing the purposes sought to be served by 8 U.S.C. § 1252(a). The inability of the INS to obtain travel documents for the petitioner within nearly four years troubles this Court. The United States has amicable relationships with Germany and Lithuania. Thus the INS cannot claim that uncertain status between the United States and any one of these countries is the reason for the inability to deport and imply that in due time the situation will or may change. The fact of the matter is that the petitioner is not now nor has he ever been a citizen of any country. To say that he is temporarily detained pending deportation is not accurate. The petitioner, a legal alien, will never be deported because there is no place to send him. This fact

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distinguishes this case from the other cases cited elsewhere in this opinion dealing with aliens awaiting deportation. The petitioner is reminiscent of E.E. Hale's novel, "Man Without A Country," except that his perpetual confinement is in a prison rather than on a ship. This result "shocks the conscience" of the Court. Accordingly, the Court finds that the petitioner's detention is violative of his constitutional rights to substantive due process. [FN6]

FN6. The petitioner makes two other arguments relating to his continued confinement pending deportation. The first of these contentions is that the petitioner's right to procedural due process was violated as to his continued confinement. The second contention is that the petitioner's incarceration violates the Eighth Amendment's prohibition against cruel and unusual punishment. However, because of this Court's ruling on substantive due process this Court need not address these claims.

IV.
CONCLUSION

For the foregoing reasons, IT IS ORDERED that the petitioner's application for *1028 writ of habeas corpus is HEREBY GRANTED.

IT IS FURTHER ORDERED that the petitioner, Kestutis Zadvydas, SHALL BE RELEASED from the custody of the INS upon conditions to be set by the Court at a hearing, which shall be held on Wednesday, November 12, 1997 at 9:00 a.m. in Room C-468.

IT IS FURTHER ORDERED that petitioner shall be released within 35 days from the date of such hearing.

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APPENDIX "B"

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sel's closing argument during the punishment phase that the shooting was accidental, are sufficient to demonstrate prejudice within the meaning of *Strickland*. Absent those inexcusable and unreasonable failures, there is a reasonable probability that the outcome of Moore's punishment phase would have been different. *Whitley*, 977 F.2d at 159; *Duhamel*, 955 F.2d at 965-66; *Wilkerson*, 950 F.2d at 1065; *Profitt*, 831 F.2d at 1249. We therefore conclude that trial counsel's cumulative errors rendered the result of Moore's punishment phase unreliable and affirm the district court's grant of relief as to punishment only.

VII.

The district court granted the writ of habeas corpus and ordered that the state court of conviction grant Moore a new trial on the issue of punishment only. On appeal, the Director argues that the district court exceeded its authority by ordering the state court to conduct a new punishment trial.

[27, 28] We agree. A federal habeas court has the power to grant a writ of habeas corpus. *Duhamel*, 955 F.2d at 968. The federal habeas court is without power, however, to order that the state conduct a new punishment hearing. *King*, 1 F.3d at 287. When relief in a capital case is limited to punishment only, as in this case, the proper course is to enter an order granting the writ, but permitting the state court of conviction a reasonable period of time in which to decide whether: (1) to hold a new trial on the issue of punishment only, as permitted by TEX.CODE CRIM. PROC. art. 44.29(c), or (2) to vacate the habeas petitioner's sentence and to impose a sentence less than death. *Granviel v. Estelle*, 655 F.2d 673 (5th Cir. Sept.1981); *Whitley*, 977 F.2d at 161; *Jones*, 788 F.2d at 1103. We therefore remand with instructions to enter such an order.

CONCLUSION

For the foregoing reasons, the district court's determination that Moore's trial counsel rendered constitutionally deficient performance which prejudiced the outcome of the punishment phase of Moore's capital trial is AFFIRMED as modified by this opinion. The cause is REMANDED to the district court with instructions to enter an order granting the writ of habeas corpus, but conditioning the issuance of that writ upon the passage of a reasonable but certain period of time during which the state court of conviction may cure the constitutional error by vacating Moore's death sentence and imposing a sentence less than death, or by conducting a new punishment hearing pursuant to Texas Code of Criminal Procedure art. 44.29(c).

Kestutis ZADVYDAS, Petitioner-Appellee,

v.

Lynne UNDERDOWN; U.S. Immigration and Naturalization Service, Respondents-Appellants.

No. 97-31345.

United States Court of Appeals, Fifth Circuit.

Aug. 11, 1999.

Resident alien sought habeas corpus relief, alleging that, since he was stateless and there was no possibility of his deportation to another country, his continued detention by Immigration and Naturalization Service (INS) following issuance of deportation order violated his due process rights. The United States District Court for the Eastern District of Louisiana, Eldon E. Fallon, J., 986 F.Supp. 1011, granted relief. INS appealed. The Court of Appeals, Garwood, Circuit Judge, held that

alien's continued detention did . .iolate his due process rights, given that reasonable procedures existed for his parole and periodic review of his detention, and possibilities of attaining citizenship in Lithuania, Germany, or Russia had not been exhausted.

Reversed.

1. Constitutional Law ⇐274.3

Long-term detention of excludable aliens pending deportation is allowable under due process clause. U.S.C.A. Const. Amend. 5.

2. Aliens ⇐53.9

Treaties ⇐8

Resident alien's continued detention by Immigration and Naturalization Service (INS), following his criminal convictions and deportation order, did not violate international treaties and customary international law proscriptions of arbitrary detention, notwithstanding his argument that he was stateless and that there was no possibility of his deportation to another country, inasmuch as his detention was not arbitrary.

3. Habeas Corpus ⇐521

Court of Appeals had jurisdiction to hear appeal of denial of habeas corpus petition filed by alien alleging that his continued detention by Immigration and Naturalization Service (INS) following deportation order violated his due process rights, inasmuch as decision to detain was not decision to execute removal order so as to be unreviewable by courts pursuant to Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which was the strictest jurisdictional standard under which his claims could be evaluated. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 242(g), 8 U.S.C.A. § 1252(g); 28 U.S.C.A. § 2241.

4. Federal Courts ⇐542

Even though district court's jurisdiction was not contested on appeal after having been contested below, Court o. peals was required to examine its own jurisdiction independently of district court before proceeding.

5. Aliens ⇐39

Congress desires minimal judicial intrusion into deportation decisions.

6. Aliens ⇐40

Immigration and Naturalization Service (INS) acted reasonably in determining that alien's habeas corpus petition, alleging that his continued detention by Immigration and Naturalization Service (INS) following deportation order violated his due process rights, was governed by permanent provision of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) authorizing detention but making it discretionary beyond 90-day period, not by earlier provisions of Anti-Terrorism and Effective Death-Penalty Act (AEDPA) requiring detention of all aliens awaiting deportation regardless of flight risk, where his deportation order had become final long before IIRIRA's effective date; Congress did not determine that aliens in custody prior to IIRIRA's effective date were, as a class, significantly more dangerous than those subsequently taken. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 241(a)(6), 242(a)(6), 8 U.S.C.A. § 1231(a)(6), 1252(a)(2); 28 U.S.C.A. § 2241.

7. Aliens ⇐40

Statutes ⇐219(6.1)

Retroactivity clause of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), barring application of IIRIRA "in the case of an alien who is in exclusion or deportation proceedings before" IIRIRA's effective date, was ambiguous enough to merit consideration of *Chevron* principles regarding deferral to agency; natural reading would seem to be that IIRIRA applied only to proceedings pending as of effective date, but usage of "before" might be read to imply that it affected only those that were free of involve-

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ment in deportation proceedings prior to effective date. U.S.C.A. Const.Amend. 5.

8. Aliens ⇐18

Exclusion of aliens is a fundamental act of national sovereignty that stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.

9. Aliens ⇐18

Power to expel or exclude aliens is a fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control.

10. Aliens ⇐39

Power of the national government to act in the immigration sphere is essentially plenary.

11. Aliens ⇐4

Aliens can claim some constitutional protections.

12. Constitutional Law ⇐252

Aliens within the territory of the United States may invoke due process clause, and this principle applies to both resident aliens and excludable aliens who have failed to effect unimpeded entry into the country. U.S.C.A. Const.Amend. 5.

13. Constitutional Law ⇐274.3

Because of their special position, certain classifications and restrictions that would be intolerable under due process clause if applied to citizens are allowable when applied to resident aliens. U.S.C.A. Const.Amend. 5.

14. Constitutional Law ⇐274.3

Because Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization, provisions in state laws respecting aliens which would be invalid under the Fourteenth Amendment are not necessarily invalid under due process clause of Fifth Amendment when contained in federal legislation. U.S.C.A. Const.Amends. 5, 14.

15. Aliens ⇐53.9

Constitutional Law ⇐274.3

Continued detention of resident alien by Immigration and Naturalization Service (INS), following his criminal convictions and issuance of deportation order, did not violate his due process rights, notwithstanding his argument that, as person born in displaced persons camp in Germany of ethnically Lithuanian parents, he was stateless, and there was no possibility of his deportation to another country; reasonable procedures for parole and periodic review of his detention were in place, and it could not be said that he would never be deported, given that possibilities of attaining citizenship in Lithuania, Germany, or Russia had not been exhausted. U.S.C.A. Const.Amend. 5; 8 C.F.R. §§ 236.1(d)(2)(ii), (3)(iii), 241.4, 241.5.

16. Constitutional Law ⇐274.3

Under due process clause, resident aliens may not be subjected to detention amounting to punishment without trial. U.S.C.A. Const.Amend. 5.

17. Aliens ⇐53.9

That government for humanitarian or administrative reasons chooses to allow excludable aliens into the country while their cases are pending does not alter their status if they were initially properly detained at the border.

18. Constitutional Law ⇐274.3

Because attempt to enter United States is a request for a privilege rather than an assertion of right, denial of entry is not a deprivation of rights subject to procedural due process. U.S.C.A. Const. Amend. 5.

19. Constitutional Law ⇐70.1(7.1)

Because denial of entry is not a deprivation of rights subject to procedural due process, and because of judiciary's deference to the other governmental branches, judiciary must leave it to Congress to determine the procedures to be used in adju-

dicating such claims. U.S.C. Const. Amend. 5.

20. Aliens ⇐46
Constitutional Law ⇐274.3

Excludable aliens have no procedural due process rights with regard to their entry, and most of their substantive rights will be constrained by the government's need to control immigration. U.S.C.A. Const.Amend. 5.

21. Constitutional Law ⇐42.3(1)

To the extent that excludable aliens' substantive due process rights are infringed, either during the immigration process or while they are on parole subject to the entry fiction, in a manner that cannot be connected to the immigration power, they may assert such rights. U.S.C.A. Const. Amend. 5.

22. Constitutional Law ⇐274.3

Resident aliens, by virtue of their presence in the United States, develop an interest in remaining that, to a certain extent, entitles them to procedural due process before they may be removed from this country. U.S.C.A. Const.Amend. 5.

23. Constitutional Law ⇐274.3

Rights of resident aliens to procedural due process before being removed from United States extend to resident aliens seeking reentry after a brief trip abroad not meaningfully interruptive of aliens' continued United States residence. U.S.C.A. Const.Amend. 5.

24. Aliens ⇐39
Constitutional Law ⇐274.3

Fact that resident alien status entitles one to due process respecting the decision to deport does not mean that the concept of government's plenary power over aliens is extinguished; on the contrary, the needs of the government are taken into account in evaluating such claims and the standard for evaluating procedures is thus lower than would be expected in analyzing the rights of a citizen with a like interest. U.S.C.A. Const.Amend. 5.

25. Aliens ⇐39

Constitutional rights of resident aliens may be affected by government's plenary power over immigration.

26. Aliens ⇐39
Constitutional Law ⇐274.3

Both excludable and resident aliens have the due process right to be free of abuses that, while tangentially and remotely related to the immigration process, cannot be justified as in furtherance of immigration goals; however, both may come in conflict with the government's sovereignty interests, and when this occurs their rights are constrained accordingly and to the same extent. U.S.C.A. Const.Amend. 5.

27. Constitutional Law ⇐274.3

Under due process clause, government may detain a resident alien based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place. U.S.C.A. Const. Amend. 5.

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Paul Lindsey Hoffman, Santa Monica, CA, for Human Rights Watch and Human Rights Advocates, Amici Curiae.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GARWOOD, DAVIS and BARKSDALE, Circuit Judges.

GARWOOD, Circuit Judge:

Petitioner-appellee Kestutis Zadvydas (Zadvydas) applied for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. He alleged that since he is a stateless person and there is no possibility of effectuating his deportation to another country, his continued detention by respondents-appellants the Immigration and Naturalization Service (INS) and its district director (whose successor, Lynne Underdown, has been substituted as a party respondent-appellee) constitutes punishment without due process of law and thus violates his due process rights and international law. The district court granted the writ and ordered Zadvydas released from custody. *Zadvydas v. Caplinger*, 986 F.Supp. 1011 (E.D.La.1997). We reverse.

Facts and Proceedings Below

Zadvydas was born in a displaced persons camp in Germany in 1948. In 1956 he immigrated with his family to America, and became a resident alien. Despite his long residence in this country, he never became a citizen.[1] Starting as a youth, Zadvydas developed an extensive criminal history. His FBI records indicate numerous arrests. In 1966 he was convicted of attempted robbery in New York. In 1974 he was again convicted in New York, this time of attempted burglary. The INS began the process of deportation in 1977, based on these two convictions. While those proceedings were pending, Zadvydas was released into the community. After a lengthy delay, Zadvydas' motion for relief from deportation under 8 U.S.C. § 1182(c) was denied on February 10, 1982. Facing a hearing before an immigration judge that year, Zadvydas disappeared. Over the next decade, the INS failed to locate Zadvydas.

In 1987, authorities in Virginia arrested Zadvydas for possessing 474 grams of cocaine with intent to distribute. According to his own testimony, Zadvydas used cocaine at that time. While on bail awaiting trial in Virginia, Zadvydas fled to Houston, Texas. After several years in Texas, Zadvydas voluntarily presented himself to Texas authorities, and he was subsequently tried in Virginia on the 1987 distribution charge. In 1992, he was convicted and sentenced to sixteen years' imprisonment, with six years suspended. After serving only two years, Virginia released him on parole. The INS promptly took him into custody and reinitiated deportation proceedings. In March 1994 the immigration judge ordered that Zadvydas should be detained without bond during the deportation process based on his history of flight from authorities. Zadvydas appealed that determination, but the Board of Immigration Appeals (BIA) affirmed the immigration judge.

In 1994 Zadvydas appeared before the immigration judge. He admitted his past criminal history, conceded deportability, and seemed to indicate that he was a German citizen. He applied for relief from deportation under 8 U.S.C. § 1182(c). In May 1994 the immigration judge denied relief from deportation and ordered Zadvydas to be deported. Zadvydas did not appeal that decision, does not challenge it here, and it has become final. The INS immediately contacted the German government to arrange for deportation. German officials, however, proved unwilling to accept Zadvydas. They took the position that under German law the mere fact Zadvydas was born on German soil did not automatically entitle him to German citizenship. The INS, while continuing to

1. The record does not reveal whether Zadvydas ever applied for citizenship.

forward requests to Germany, contacted Lithuanian authorities in July 1994. The Lithuanians tersely responded that they could not accept Zadvydas since he was neither a citizen nor a permanent resident of Lithuania.

In May 1995, after the INS had forwarded to German authorities all the material they believed was necessary to establish Zadvydas' citizenship, the German authorities declined to accept Zadvydas. Referencing extensive research that they assertedly had conducted, they declared that Zadvydas was not a German citizen and thus could not be deported to Germany. Subsequent communications with the German authorities apparently did not generate a response. Based on the fact that Zadvydas' wife is a citizen of the Dominican Republic, the INS apparently wrote Dominican authorities. No Dominican response is in the record. In October 1996, the INS again contacted Lithuania to ascertain whether Zadvydas could claim citizenship. The Lithuanian government has since responded by stating that Zadvydas, while not one of their citizens, could apply for citizenship if he could prove that both of his parents were born in Lithuania prior to 1940. In letters dated October 26, 1998, and March 25, 1999, the Lithuanian government has broadly outlined the type of documentation it would require, and stated that Zadvydas should present such materials to it.

In September 1995, Zadvydas filed the instant petition for a writ of habeas corpus under section 2241, claiming that his continued detention violated the Eighth Amendment, the due process clause, and international law. In February 1997 the magistrate judge recommended denial of Zadvydas' habeas petition. Zadvydas filed objections. In November 1997 the district court found that continued detention of Zadvydas was unconstitutional. The court rejected all of Zadvydas' challenges to his deportation and the denial of his request for relief under section 1182(c), and it further ruled that his continued detention was authorized by 8 U.S.C. former § 1252(a)(2)(B) because he had not shown "that he is not a threat to the community and that he is likely to appear at any scheduled hearing." 986 F.Supp. at 1024.[2] However, concluding that Zadvydas was "stateless" and thus could "never be deported because there is no place to send him", the court held that Zadvydas could not be "permanently incarcerated" without violating his substantive due process rights. While the INS had procedures to review continuing detention, and Zadvydas thus could possibly be released in the future, the court discounted this possibility, finding that in practice there was "no end in sight" for Zadvydas' detention. 986 F.Supp. at 1027. The court ordered Zadvydas released under a list of conditions it generated. The INS timely appealed.[3] While this appeal has been pending, Zadvydas seems to have complied with the district court's release conditions and has apparently conducted himself as a productive member of society.

Discussion

[1, 2] The district court found that given the uncertainty that any nation would be found that would accept Zadvydas, his

2. Former section 1252(a)(2)(B) provided:
"The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings."
The district court further observed in this connection that the INS had also interviewed Zadvydas and reviewed his file and determined not to then release him under the similar standards of the Transition Period Custody Rules pursuant to section 303(b)(3)(B) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. 986 F.Supp. at 1024-5 n. 4. The INS had determined thereunder that Zadvydas was "a threat to security as well as a flight risk."

3. Zadvydas has not cross-appealed.

detention was indefinite. It further found that such indefinite detention violated his substantive due process rights. The law, at least in this Circuit, regarding the long-term detention of excludable aliens pending deportation is clear—such detention is allowable. *See, e.g., Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1448 (5th Cir. 1993). Zadvydas argues, however, that these cases can have no application to his status since he is a resident alien and thus can claim enhanced constitutional protection. He maintains that even if the government may detain an excludable alien indefinitely, it violates substantive due process to inflict such detention on a resident alien such as himself.[4] The INS argues, however, that once a resident alien such as Zadvydas is—concededly in adherence with procedural and substantive due process—ordered deported and that order becomes final, the resident alien may claim no greater rights than an excludable alien in like circumstances. To the extent that the circumstances of this case require us to follow their logic, we agree with the INS.

I. Preliminary Matters

[3–5] As a threshold matter, we must address the question of this Court's jurisdiction. Although the INS contested the district court's jurisdiction below; it has not done so on appeal. We must nevertheless examine our own jurisdiction independently before proceeding. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S.Ct. 1055, 1072, 137 L.Ed.2d 170 (1997). Congress has clearly indicated that it desires minimal judicial intrusion into deportation decisions. The strictest jurisdictional standard under which Zadvydas' claims could be evaluated are provided by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104–208, 110 Stat. 309–546, which repealed the prior judicial review schemes governing immigration and substituted new provisions potentially applicable to Zadvydas. *See* 8 U.S.C. § 1252(g).[5] The Supreme Court has recently construed the jurisdictional effect of section 1252(g). *See Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999). In *Reno*, the Court held that the enactment was not a general bar, but rather limited judicial review of a narrow class of discretionary executive actions. By the statute's terms, one of the actions immune from review is an action to "execute removal orders against any alien under this chapter." In a recent case, the Seventh Circuit has held that these provisions do not remove our jurisdiction to hear a section 2241 habeas petition challenging the validity of the statutes authorizing the detention of aliens. This is because the detention, while intimately related to efforts to deport, is not itself a decision to "execute removal orders" and thus does not implicate section 1252(g) under *Reno*. *See Parra v. Perryman*, 172 F.3d 954, 957 (7th

4. Zadvydas also claims that his continued detention violates both international treaties and customary international law proscriptions of arbitrary detention. We do not believe that the continued detention here could be described as arbitrary. In any case, we rejected an identical international law claim in *Gisbert*. *See Gisbert*, 988 F.2d at 1448. We are unaware of any presently relevant distinction in international law between excludable and resident aliens, so for the purposes of adjudicating the application of international law *Gisbert* is directly controlling. Zadvydas' claims that his procedural due process and Eighth Amendment rights are violated by his continued detention were expressly not reached by the district court (986 F.Supp. at 1027 n. 6) and were not argued before us. We do not address them here.

5. Section 1252(g) provides:
"(g) Exclusive Jurisdiction
Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

Cir.1999). We agree, and find jurisdiction to hear this appeal.

[6] We next must address the statutory regime governing Zadvydas' continued detention. Zadvydas was released into INS custody in 1994. Since that time, a flurry of statutory changes have taken place. Zadvydas' detention could be covered by one of four separate detention regimes, depending on the degree of retroactivity involved. Two of them, the rule in place when he was initially detained, *see* 8 U.S.C. § 1252 (1994), and the Transition Period Custody Rules authorized in IIRIRA, place the burden on a detainee awaiting deportation to prove that he is not a danger to the community or a flight risk before being released on parole pending deportation. The third, most recent, provision—IIRIRA's permanent provision—authorizes detention but makes it discretionary beyond an initial ninety day period. *See* IIRIRA § 305(c), *codified* as 8 U.S.C. § 1231(a)(6), Immigration and Nationality Act (INA) § 241(a)(6).[6] From a constitutional perspective, the choice between these regimes appears to be of at most marginal import. However, the rules established by the immigration provisions of the Anti-Terrorism and Effective Death-Penalty Act (AEDPA) order mandatory detention of all aliens awaiting deportation, regardless of danger or flight risk. *See* AEDPA, Pub.L. 104-132 § 440(c), 110 Stat. 1214, 1277 (amending 8 U.S.C. § 1252(a)(2) to delete provisions allowing release of nondangerous nonflight-risk detainees).

[7] The parties agree that AEDPA § 440(c) does not apply, and both maintain that this case is governed by the new section 241 established by the IIRIRA, which they argue applies to all aliens who are not "in proceedings" at its effective date. It would seem clear that Zadvydas is not in deportation proceedings—the order regarding his deportation was issued and became final long before IIRIRA's effective date, and only the physical act of deportation remains undone. Moreover, the rapid passage of IIRIRA in the immediate wake of AEDPA seems to indicate that Congress repudiated the harsh mandatory detention regime created by AEDPA for aliens whose deportation is final. To apply AEDPA to Zadvydas based solely on the accident of when proceedings against him began would seem to make little sense—there is no reason to suspect that Congress determined that aliens in custody prior to the effective date of IIRIRA were, as a class, significantly more dangerous than those subsequently taken and thus merited harsher treatment. While the statute currently is not a model of clarity[7] in respect to its retroactive

6. Certain classes of aliens, including criminal aliens such as Zadvydas, "may be detained beyond the [90 day] removal period." 8 U.S.C. § 1231(a)(6).

7. IIRIRA's retroactivity clause, section 309(c)(1), bars application of its provisions "in the case of an alien who is in exclusion or deportation proceedings before" its effective date. The statute's section dealing with retroactivity is generally phrased in the present tense. The title to the section is, for example, "Transition for Aliens in Proceedings," and the clause applies to an alien who "is in" proceedings at the effective date. The natural reading of the clause would thus seem to be that it applies only to proceedings that are pending as of the effective date. *See American-Arab*, 119 S.Ct. at 943 (defining transitional cases under section 309(c)(1) as "cases pending on the effective date of IIRIRA"). *See also id.* at 945 (referring to "§ 309(c)(1)'s general rule" that IIRIRA's provisions "do not apply to pending cases"). The problem is created by the statute's usage of "before," which might be read to imply that the statute only affects those that were free of any involvement in deportation proceedings prior to the effective date. The confusing "before" was, however, the product of what was labeled as a "technical" amendment established by the Hatch-Kennedy amendment to the H-1A Nursing Bill. See Pub.L. 104-302, 110 Stat. 3657. Nothing indicates what the goal of this amendment was, and the failure of the amendment to change the surrounding language makes its intended purpose unclear. Accordingly, we find the text ambiguous enough to merit consideration of *Chevron*, particularly in light of the seeming absurdity of a contrary result and the constitutional problems it might possibly create.

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application to an alien in Zadvydas' position, we find the INS' construction reasonable. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We conclude that Zadvydas' detention is governed by the new provisions of section 241.

Because we agree with the parties that new INA section 241 applies, we will proceed to analyze the constitutional question presented under the assumption that Zadvydas will be able to obtain periodic review of his detention. Under INA § 241(a)(1) & (2), 8 U.S.C. § 1231(a)(1) & (2), the Attorney General is required to remove an alien from the United States within the "removal period," defined generally as the ninety days beginning when an order of removal becomes administratively final, when any judicial review thereof is completed, or when the alien is released from confinement (other than under an immigration process), whichever is latest, and is required to detain the alien during the removal period. If the alien is not removed within the removal period, "the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General." *Id.* § (a)(3). INA § 241(a)(6), 8 U.S.C. § 1231(a)(6) provides:

"An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2)[8], or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." (Emphasis added).

INS regulations, *see* 8 C.F.R. §§ 236.1(d)(2)(ii), 236.1(d)(3)(iii), 241.4 & 241.5, as explained and expounded in the February 3, 1999, "Memorandum for Regional Directors" from INS Executive Associate Commissioner Michael A. Pearson concerning "Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable," authorize the release of such aliens when it is determined that the alien "is not a threat to the community and is likely to comply with the removal order," and further provide that the alien must be given the opportunity to so demonstrate, that every six months the District Director must "review the status of" such "aliens ... to determine whether there has been a change in circumstances that would support a release decision," that the alien's file must be documented to show "the reasons for the custody or release decision," and that "if the alien submits a written request to have his detention status reviewed by the District Director ... the alien may appeal the District Director's decision to the Board of Immigration Appeals."[9]

8. 8 U.S.C. § 1227(a)(2). INA § 237(a)(2), includes aliens, such as Zadvydas, convicted of an aggravated felony or a controlled substance violation.

9. The Pearson memorandum states in pertinent part:

"... 8 C.F.R. § 241.4 gives the District Director the authority to make release decisions beyond the removal period based on specific criteria in the regulation as set forth below. The regulation also provides that the District Director should provide an alien with the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order. The alien may be given this opportunity in writing, orally, or a combination thereof. The District Director must ensure that the file is documented with respect to the alien's opportunity to present factors in support of his release, and the reasons for the custody or release decision.

...

Every six months, the District Director must review the status of aliens detained beyond the removal period to determine whether there has been a change in circumstances that would support a release decision since the 90 day review. Further, the District Director should continue to make every effort to effect the alien's removal both before and after the expiration of the removal period. The file should document these efforts as well.

The district court found that the INS did not err in determining that Zadvydas posed a danger to the community and a flight risk. Should Zadvydas no longer do so, he would doubtless be released.

II. *Gisbert* and Excludable Aliens

[8–10] Article I, section 8, clause 4 of the Constitution vests in Congress the power to "establish an uniform Rule of Naturalization." Moreover, "[t]he exclusion of aliens is a fundamental act of national sovereignty" that "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950). *See also Chae Chan Ping v. United States*, 130 U.S. 581, 9 S.Ct. 623, 630, 32 L.Ed. 1068 (1889) (discussing sovereignty justification). The basic source of this interest is identical regardless of whether the government seeks to exclude an alien who has not entered, or to expel an alien who has resided here. *See Fong Yue Ting v. United States*, 149 U.S. 698, 13 S.Ct. 1016, 1019, 37 L.Ed. 905 (1893) ("The right ... a nation to expel or deport foreigners who have not been naturalized ... is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."). When these principles are taken together, it is clear that "the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 1478, 52 L.Ed.2d 50 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S.Ct. 625, 628, 97 L.Ed. 956 (1953)). *See also Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952) ("It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted

District Directors are advised that a detention review is subject to the provisions of 8 C.F.R. § 236.1(d)(2)(ii) if the alien submits a written request to have his detention status reviewed by the District Director. Under 8 C.F.R. § 236.1(d)(2)(iii), the alien may appeal the District Director's decision to the Board of Immigration Appeals. Where the alien has not made a written request to have his custody status reviewed, however, there is no provision for appeal of the District Director's decision to the Board of Immigration Appeals. *See* 8 C.F.R. § 241.4."

8 C.F.R. § 241.4(a) provides:

"(a) *Continuation of custody for inadmissible or criminal aliens.* The district director may continue in custody any alien inadmissible under section 212(a) of the Act or removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:

(1) The nature and seriousness of the alien's criminal convictions;

(2) Other criminal history;

(3) Sentences of imposed and time actually served;

(4) History of failures to appear for court (defaults);

(5) Probation history;

(6) Disciplinary problems while incarcerated;

(7) Evidence of rehabilitative effort or recidivism;

(8) Equities in the United States; and

(9) Prior immigration violations and history."

The release of an alien under section 241.4 shall be under a supervision order requiring, *inter alia*, periodic reporting to the INS, continued efforts to obtain travel documents, advance approval of travel beyond any therein specified limits, and giving notice of change of address; a bond may also be required; and, the INS "may grant employment authorization to an alien" released under section 241.4. *See* C.F.R. § 241.5.

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to the political branches as to be largely immune from judicial inquiry or interference."). The power of the national government to act in the immigration sphere is thus essentially plenary.

[11, 12] Aliens can of course claim some constitutional protections. The language of the due process clause refers to "persons," not "citizens," and it is well established that aliens within the territory of the United States may invoke its provisions. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886); *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 981, 41 L.Ed. 140 (1896) (illegal resident alien could not be punished by sentence to hard labor without due process of law). While the cases have drawn a line for some purposes between excludable aliens who failed to effect entry into the country unimpeded and resident aliens, in this Circuit it is clear that the former also can be considered persons entitled to protection under the 14th Amendment. *See Lynch v. Cannatella*, 810 F.2d 1363, 1375 (5th Cir.1987) ("Excludable aliens are not non-persons."). We cannot suppose that the result in *Wong Wing* would have been different had the alien there been excludable rather than resident.

[13, 14] However, alien status can affect our analysis of constitutional rights. Because of their special position, certain classifications and restrictions that would be intolerable if applied to citizens are allowable when applied to resident aliens. *See, e.g., Cabell v. Chavez-Salido*, 454 U.S. 432, 102 S.Ct. 735, 740, 70 L.Ed.2d 677 (1982) (state's exclusion of resident aliens from basic governmental functions did not violate the constitution).[10] *See also DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). More importantly for the issue before us, courts have long recognized that the governmental power to exclude or expel aliens may restrict aliens' constitutional rights when the two come into direct conflict. *See Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 1891, 48 L.Ed.2d 478 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."). Indeed, the Court has accepted collateral damage to the constitutional rights of citizens as an acceptable price to pay in deference to the plenary power over aliens of the political branches of the national government. *See Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 2582–84, 33 L.Ed.2d 683 (1972) (recognizing citizen audience had First Amendment interest in listening to communist agitator, but accepting government's exclusion of alien speaker despite this interest). *See also United States v. Williams*, 194 U.S. 279, 24 S.Ct. 719, 48 L.Ed. 979 (1904).

[15, 16] Zadvydas claims that his detention amounts to punishment without trial, and thus violates his substantive due process liberty interest. It is well established that resident aliens may not be punished in this manner. *See Wong Wing*, 16 S.Ct. at 981. However, the *Wong Wing* court distinguished between the unconstitutional act before it—which made illegal presence in the country summarily punishable by a sentence to being "imprisoned at hard labor" for not more than a year and provided that the alien would be "*thereafter* removed from the United States" (emphasis added)—and detention pending deportation. "Proceedings to exclude or expel would be in vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation." *Id.* at

10. Further, "the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." *Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 1895, 48 L.Ed.2d 478 (1976). Thus, provisions in state laws respecting aliens which would be invalid under the Fourteenth Amendment are not necessarily invalid when contained in federal legislation. *Id.* at 1893–95.

980. We have clearly held t excludable aliens may be detained pending deportation without such detention constituting unconstitutional punishment, even when the aliens' country of origin indicates it will not accept their return. *See Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1448 (5th Cir.1993). *See also Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir.1995) (*en banc*) (accord with *Gisbert*).

[17] *Gisbert* dealt with the detention of a group of Cubans who were part of the Mariel boatlift. After detaining these aliens prior to entry—thus ensuring that they were excludable aliens—the United States decided that they should be returned to their country of origin. Castro refused to accept their return, however, and the aliens were released on immigration parole. Due to the working of the "entry fiction," [11] the aliens retained their excludable status despite their freedom on American soil. All of the aliens in *Gisbert* then committed, and were convicted of, crimes while on parole. After their release from the criminal justice system, the aliens were detained pending deportation to prevent any further criminal acts. In *Gisbert*, as under the provisions here, there was a procedure that allowed the detained alien to be released from detention while deportation was still impractical. *See id.* at 1443 n. 11 (detailing annual review procedures that allowed release of aliens found not to present a danger to the community).

The aliens did not challenge the conditions of their confinement or the procedures used in the initial decision to deport them. They instead argued that their continued confinement constituted punishment without a criminal trial and thus violated their substantive due process rights. They emphasized the fact that in light of Castro's refusal to accept their deportation, their confinement was potent indefinite. We rejected these arguments and held that the continued, indefinite detention of the aliens did not violate their constitutional rights. In reaching this result, we relied on the Court's decision in *Mezei*, in which it allowed the indefinite detention of an excludable alien who had been ordered permanently excluded and could find no nation to receive him. *See Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956. Drawing on the reasoning of *Mezei*, we found that detention pending deportation does not constitute punishment, since the detention could rationally be seen as a necessary byproduct of the need to expel an unwanted alien rather than a punitive decision. *Gisbert*, 988 F.2d at 1442. The continued detention of Mariel Cubans thus did not constitute punishment without trial in violation of the aliens' substantive due process rights, even though there was no guarantee that deportation could be effectuated in the near future.

Zadvydas attempts to distinguish *Gisbert* and *Mezei* on the ground that he is a resident alien, and thus is entitled to a greater degree of substantive due process protection than the excludable aliens in those cases. Zadvydas' resident alien status surely entitled him to greater *procedural* rights in the determination of whether he was entitled to remain in the United States than were granted the excludable aliens in those cases. However, Zadvydas does not challenge here the procedures used by the government in deciding to deport him, or the final result. His only complaint is with the detention itself. As explained in part IV below, we do not believe that the difference between excludable aliens and resident aliens mandates a radical departure from the reasoning of *Gisbert* when, as here, a final decision to deport the once resident alien has been made and stands unchallenged.

11. The fact that, for humanitarian or administrative reasons, the government chooses to allow excludable aliens into the country while their cases are pending does not alter their status if they were initially properly detained at the border. *See, e.g., Ahrens v. Rojas*, 292 F.2d 406, 410 (5th Cir.1961).

III. Permanent Co

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III. Permanent Confinement

The district court held that Zadvydas' detention violated his substantive due process rights because it constituted "permanent confinement" in that he "will never be deported because there is no place to send him." 986 F.Supp. at 1026, 1027. We conclude that these reasons considerably overstate the matter.

To begin with, Zadvydas may be released when it is determined that he is no longer either a threat to the community or a flight risk, and he is entitled to automatic review of his case for this purpose every six months, with opportunity to present factors in support of his release, and, where his written application for release has been denied by the district director, he may appeal that decision to the BIA. See note 9, *supra*, and accompanying text. In *Barrera-Echavarria*, the en banc Ninth Circuit concluded that analogous annual INS administrative review for release under similar standards precluded characterization of the alien's detention as "'indefinite' or 'permanent.'" 44 F.3d at 1450.[12]

Nor can it now be said with any real assurance that Zadvydas "will never be deported." To be sure, it is clear that due to an unfortunate combination of circumstances, locating a country to which Zadvydas may be deported has been and will be difficult at best; but that there is no meaningful possibility of doing so has not been clearly established. And, precisely because of the complexities involved, more time than usual will doubtless in any event be required.

The problem of deporting Zadvydas has its roots in the tortured twentieth century history of what is now Lithuania. Up until the German defeat in World War One, portions of Lithuania were located in Germany. Zadvydas' mother was born in that section of modern Lithuania—then known as the Memel region, now called Klaipeda—in 1919. Six years earlier (according to his own account in an affidavit prepared to secure his post-war immigration to America), Zadvydas' father had been born in Mazeikiai, which is located on the Baltic coast outside of the disputed Memel region and thus would presumably have been under Russian control at the time of his birth. As part of the Versailles Treaty, Germany ceded the Memel region to the Allies. Lithuania, having renewed its existence as an independent state, successfully laid claim to the area and occupied it in 1923. At that point, Zadvydas' mother and father presumably would both have been Lithuanian citizens, since they were apparently born within the resurrected nation's current borders.

However, in 1939 Germany issued an ultimatum to Lithuania demanding the return of the Memel region, referencing the alleged plight of ethnic Germans under Lithuanian rule. The territory was then handed back to Germany, and (if she was still living in the region) Zadvydas' mother then would have become a subject of Nazi Germany. Unlucky in neighbors, Lithuania then had its independence extinguished by Stalin's 1940 invasion, which placed Zadvydas' father in the Soviet orbit (again, presuming he lived near his claimed home town at the time). *See generally* Algimantas Gureckas, *Lithuania's Boundaries and Territorial Claims Between Lithuania and Neighboring States*, 12 N.Y.L. Sch. J. Int'l & Comp. L. 107 (1991). Hitler then invaded the Soviet Union in 1941, and Lithuania was under German occupation for most of the Second World War. Late in that conflict, the Soviet army reoccupied Lithuania. The Soviets did not reestablish the Lithuanian independence they had earlier snuffed out, and Lithuania remained a captive to Soviet tyranny until 1991. In the midst of all this, Zadvydas' parents were married in 1943. At some point, the couple moved (or fled) to Germany, where their first child was born in 1944. The

12. We also note that at a certain point—which Zadvydas may be approaching—age alone would likely weigh heavily against an INS finding of continued danger to the community or flight risk.

family spent the immediate pos years in displaced person camps in Germany. On Nov. 21, 1948, Zadvydas was born in one of these camps. In 1956 the family immigrated to America.

Due to these events, Zadvydas may in a sense be stateless. While born in Germany, he cannot claim German citizenship on that basis alone, because under German law citizenship hinges on blood (*jus sanguinis*) rather than place of birth (*jus soli*). Lithuania would seem to be the obvious alternative. Lithuanian *sanguinis* may be able to substitute for Zadvydas' birth outside of Lithuania. According to the communications from the Lithuanian government, Zadvydas can apply for Lithuanian citizenship if both his parents were born in Lithuania prior to the Soviet invasion in 1940.[13] According to their own accounts, both parents would qualify under this standard. The difficulty that has so far delayed the process seems to be the need to document this fact. There is a baptismal certificate indicating his mother's birth in the Memel region, which is now part of Lithuania.[14] However, there is no corresponding documentation demonstrating that Zadvydas' father was born in Mazeikiai. The only evidence th s been unearthed up to this point is his affidavit upon entering the United States, which claimed birth in Lithuania.

The Lithuanian government, in letters dated October 26, 1998, and March 25, 1999, indicated that Zadvydas might apply for citizenship, but would have to personally and formally request it, and present documentation of his parent's birth. The INS had previously presented most of the available documentation—the baptismal certificate and Zadvydas' father's affidavit—in its communications with Lithuania. It is not clear, however, whether these materials were examined by the Lithuanians as support for an application for citizenship, rather than as part of a claim that Zadvydas already possessed citizenship. Certainly there has been no definitive denial by Lithuania of any application for citizenship by Zadvydas. Accordingly, it is premature to assume that the Lithuanians will reject Zadvydas based on the current documentation. Even if they were to demand more reliable evidence of his father's birthplace, there is no basis on which to conclude that more cannot be uncovered. After all, it does not seem disputed that he

13. Lithuania's citizenship laws are apparently designed to give preference to ethnic Lithuanians over the large number of ethnically Russian immigrants who established themselves in the years of communist occupation. The requirement of proving birth of one's ancestors in Lithuanian territory neatly differentiates the two populations. *See* Ruta M. Kalvaitis, *Citizenship and National Identity in the Baltic States*, 16 Bos. U. Int'l L.J. 231 (1998). This seems to be merely a variant of the *jus sanguinis* principal. It should be noted that the blood citizenship laws that must be navigated here would appear to administratively function somewhat differently from American birth citizenship laws. Because birth alone is not sufficient, it appears that under Lithuanian practice one (or one's parents) has to affirmatively apply for citizenship. The fact that Lithuania is asserting that Zadvydas must apply for citizenship may thus not be unusual. It does seem to have caused some confusion in the communications between the INS and Germany and Lithuania. The INS continually asked for confirmation that Zadvydas was a citizen, rather than framing the matter as an application for citizenship. Given the circumstances of Zadvydas' birth, it would seem unlikely that his parents paused to put him in the national registry of either country. While perhaps understandable, this confusion may have slowed the process here.

14. Zadvydas attempts to argue that the fact that at the time Zadvydas' mother was born the status of the Memel region was unsettled indicates that she could not claim Lithuanian citizenship. Nothing in the record supports this theory, and it would seem contrary to ordinary practice. *See Restatement Third, Restatement of the Foreign Relations Law of the United States* § 208, comment *c*; *id.* Reporters' Note 3 ("Normally, the transfer of territory from one state to another results in a corresponding change in nationality for the inhabitants of that territory"). While there is some evidence that Zadvydas's mother considered herself stateless, or German, this may not accurately track Lithuanian nationality law.

was born in what became Lithuania. For example, a search of the public records in Mazeikiai or elsewhere (so far apparently unperformed anywhere by anyone) might prove fruitful. To be sure, such efforts may ultimately prove unsuccessful. And even if unimpeachable evidence of Lithuanian parentage is produced, there is a hint in the record that Lithuania might be able to reject Zadvydas' application based on his criminal record. However, there is no basis for finding that any ability of Zadvydas to become a Lithuanian citizen, and hence deportable there, has been definitively foreclosed.

Also, apart from Lithuania, two other potential options appear to remain unexplored. The record indicates that the German government, in a letter dated May 1995, has definitively rejected the INS' efforts to deport Zadvydas to Germany and mentioned "extensive research" establishing that he is not a German citizen. If—as it appears—the only evidence put forth by the INS was Zadvydas' birth in Germany, this decision would seem justified under the *jus sanguinis* principle. However, it would seem that another argument, as yet apparently untapped, might properly be advanced to justify Zadvydas' German citizenship. Zadvydas may in fact have German blood, and thus qualify under *jus sanguinis*.

After World War Two, German law allowed members of ethnic German communities—some of which, such as the "Volga Germans," had been separated from Germany proper for centuries—to claim citizenship under far more lenient terms than applied to foreigners generally. *See* Note, *Deutschland ist Doch ein Einwanderungsland Geworden: Proposals to Address Germany's Status as a "Land of Immigration,"* 30 Vand. J. Transnat'l L. 905, 916–923 (1997). Zadvydas' mother was born in the Memel region in 1919. Prior to its defeat in World War One, this region was part of Germany. It would thus seem reasonably possible that Zadvydas' mother could be considered an ethnic German—indeed, her birth documentation is in German, not Lithuanian or Polish. It lists her maiden name as Steffan, and her mother's maiden name as Jackshies. It is not obvious to us that these are non-Germanic names. Perhaps Zadvydas could apply for German citizenship claiming ethnic German ancestry.[15] Obviously, the success of such an approach is far from assured—and even if Zadvydas' ethnic status can be shown, his presence in the United States, lack of language skills, or what seems to be his father's likely un-Teutonic ethnicity might defeat such an application. *But see id.* at 923 ("Judicial interpretation and administrative application of the statutes governing naturalization of ethnic Germans have established that the threshold for proving oneself to be an ethnic German is very low.").

A final potential option, apparently completely unexplored, is to attempt to claim Russian citizenship for Zadvydas. Wherever Zadvydas' parents were born, it seems undisputed that their birthplaces would have been inside the borders of the Soviet Union at its post-war height. Russia has apparently been liberal in granting citizenship to former citizens of the Soviet Union now living outside of Russia's borders. See Kalvaitis, *National Identity in the Baltic States*, 16 Bos. U. Int'l L.J. at 240 n. 64. It is noted in an INS affidavit that Zadvydas' mother travels to Russia frequently. Before the immigration judge Zadvydas seemed to indicate that these visits were to visit family.[16] An INS letter indicates the Zadvydas's mother has a sister in Russia whom she visits every year.

15. There is nothing to indicate that the mother's potential German ethnicity would in any way affect parallel efforts to obtain Lithuanian citizenship. Lithuania's laws appear to be solely focused on the problem of Russian immigrants.

16. When the immigration judge asked whether Zadvydas was aware of any relatives he might have in Germany on his mother's side who she was in contact with, Zadvydas replied "no, she goes to Russia."

If Zadvydas does indeed ha a aunt living in Russia, he might perhaps qualify for citizenship there. The record does not reveal the details of this apparent family relationship, nor does it contain a discussion of Russian citizenship law. Again, then, success obviously cannot be presumed. The point is that the record indicates that there may be some slight possibility of this, and that this possibility is apparently wholly unexplored.

As the preceding discussion indicates, the unfortunate historical context of Zadvydas' birth makes untangling his true nationality highly difficult and time consuming at best. But that does not mean impossible. Continued efforts might eventually produce a breakthrough with Lithuania—and, if required, further proof of his father's birth may ultimately be unearthed. And avenues for claiming German and Russian citizenship remain unexplored. Nor is it clear that the Dominican situation has been fully explored. While the delay here is long, it appears to be what one could expect given the tangled circumstances and inadequate documentation. Given the traditional deference we show to the other branches in matters of immigration policy, judicial intrusion should not be considered, particularly where there are reasonable avenues for parole, until there is a more definitive showing that deportation is impossible, not merely problematical, difficult, and distant. However, it is certainly no clearer here that Zadvydas "will never be deported because there is no place to send him" than it was respecting the aliens in *Gisbert*, and here, as also in *Gisbert*, 988 F.2d at 1447, the government is continuing its efforts to effect Zadvydas' removal.

IV. Substantive Due Process and Detention of a Resident Alien Validly Ordered Deported

Zadvydas argues that as a resident alien he has greater rights under these circumstances than an excludable alien would, and thus that his current detenti a form of punishment unjustified by any criminal conviction despite the result in cases such as *Mezei* and *Gisbert* involving excludable aliens. However, there is little, if any, room for a distinction between the rights in this respect of excludable and resident aliens when their circumstances are so similar. Zadvydas' detention is currently within the core area of the government's plenary immigration power and thus does not violate substantive due process.

[18-21] The differences that exist in the rights of excludable and resident aliens are not the product of some bright line division that places excludable aliens beyond the pale of constitutional scrutiny. Excludable aliens are persons, entitled to some due process, and other, constitutional protections. The fact that they are entitled to a lesser degree of procedural due process in proceedings to determine whether they may enter the country stems ultimately not from their status as such, but rather from the nature of what is asserted. An attempt to enter this country is a request for a privilege rather than an assertion of right. *See Landon v. Plasencia*, 459 U.S. 21, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982). Denial of entry is thus not a deprivation of rights subject to procedural due process, and that, coupled with our deference to the other branches, mandates that we leave it to Congress to determine the procedures to be used in adjudicating such claims. *See, e.g., Knauff*, 70 S.Ct. at 313 ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). In practice, this determination may foreclose most constitutional challenges on behalf of excludable aliens and create the impression that they have no constitutional rights. They have no procedural rights with regard to their entry, and most of their substantive rights will be constrained by the government's need to control immigration. *See, e.g., Gisbert*, 988 F.2d at 1448. Since many will never enter the country or will do so only briefly, they will have little opportunity to assert *Yick Wo*-type rights in matters unconnected to the plenary power. However, to the extent that their substantive rights are infringed—either during the immigration process or while they are on parole subject to the entry fiction—in a manner that cannot be connected to the immigration power, they may assert such rights. *See Lynch*, 810 F.2d at 1374–75 (excludable aliens are persons, and thus allowed to bring suit against allegedly brutal government agents since "we cannot conceive of any national interests that would justify the malicious infliction of cruel treatment").

[22, 23] Resident aliens, by virtue of their presence here, develop an interest in remaining that, to a certain extent, entitles them to procedural due process before they may be removed from this country. *See, e.g., Landon*, 103 S.Ct. at 329 (in a discussion limited to procedural due process rights, noting "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation [citations], and, ... we developed the rule that a continuously present permanent resident alien has a right to due process in such a situation.").[17]

[24] However, the fact that resident alien status entitles one to due process respecting the decision to deport does not mean that the plenary power concept is extinguished. On the contrary, the needs of the government are taken into account in evaluating such claims and the standard for evaluating procedures is thus lower than would be expected in analyzing the rights of a citizen with a like interest. *See Landon*, 103 S.Ct. at 330 (resident alien who has not severed her ties to the country is entitled to due process before being removed, but in evaluating procedures "it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative"); *Galvan v. Press*, 347 U.S. 522, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954) (noting that while deportation of a long term resident alien is drastic measure with consequences analogous to those stemming from a criminal conviction, plenary power precedent mandates nonapplicability of the *ex post facto* clause); *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 3483, 82 L.Ed.2d 778 (1984) (deportation, despite the weighty interests involved, is a civil proceeding and not subject to the same battery of procedural protections as would govern a criminal trial); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 44 S.Ct. 54, 56, 68 L.Ed. 221 (1923) (involuntary confession admissible in deportation hearing).

[25, 26] Nothing in these cases suggests that a resident alien has a broadly privileged constitutional status relative to excludable aliens, or is constitutionally entitled to more favorable treatment when both the right asserted and the governmental interest are identical to those in the parallel case of an excludable alien.[18] The constitutional rights of resident aliens may certainly be affected by the plenary power. *See, e.g., Fong Yue Ting*, 13 S.Ct. at 1026 (in case involving rights of a resident alien, distinguishing *Yick Wo* on the grounds

17. Indeed, as *Landon* reflects, those rights extend to resident aliens seeking reentry after a brief trip abroad not meaningfully interruptive of the alien's continued United States residence. *Id.* 103 S.Ct. at 329–330.

18. In *Landon*, the court noted that a resident alien had greater substantive rights under the immigration *statutes*. *See Landon*, 103 S.Ct. at 326. In *Gisbert*, we referenced this discussion of statutory treatment and concluded that resident aliens "generally are granted greater substantive rights than are excludable aliens." *Gisbert*, 988 F.2d at 1440. Nothing in this discussion can be read to imply that there is an across-the-board difference in the constitutional (as opposed to statutory or regulatory) status of the two categories of aliens.

that "[t]he question there was of the power of a state over aliens continuing to reside within its jurisdiction, not of the power of the United States to put an end to their residence in the country"); *Wong Wing*, 16 S.Ct. at 981 (drawing distinction between "the power of congress to protect, by summary methods, the country from the advent of aliens ... or to expel such if they have already found their way into our land, and unlawfully remain therein" and the decision to imprison aliens at hard labor for a term notwithstanding the ability to rapidly remove the alien from the national community). Both excludable and resident aliens have the right to be free of abuses that—while tangentially and remotely related to the immigration process—cannot be justified as in furtherance of immigration goals. *See Lynch*, 810 F.2d at 1375 (excludables); *Wong Wing*, 16 S.Ct. at 981 (resident). But both excludable and resident aliens may come in conflict with the government's sovereignty interests, and when this occurs their rights are constrained accordingly and to the same extent. As applied to detention pending removal, any here relevant constitutional distinction between excludable and resident aliens who have each been properly and finally determined to be removable would necessarily rest on a conclusion that excludable aliens are nonpersons wholly unprotected by the Constitution. However, that conclusion would conflict with our holding in *Lynch* and would require us to conclude that aliens in the position of those in *Gisbert* could be statutorily subjected to the rack and the screw, the Eighth Amendment notwithstanding.

In the circumstances presented here, the national interest in effectuating deportation is identical regardless of whether the alien was once resident or excludable. When a former resident alien is—with the adequate and unchallenged procedural due process to which his assertion of a right to remain in this country entitles him—finally ordered deported, the decision has irrevocably been made to expel him from the national community. Nothing remains but to effectuate this decision. The need to expel such an alien is identical, from a national sovereignty perspective, to the need to remove an excludable alien who has been finally and properly ordered returned to his country of origin. *See Fong Yue Ting*, 13 S.Ct. at 1022 (the "power to exclude aliens, and the power to expel them, rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power"). Whether the party to be deported is an excludable or a former resident, the United States has properly made its decision and earnestly wishes—if for no other reason than to save the cost of detention—to deport the detainee. And deportation itself is not punishment. *See INS v. Lopez-Mendoza*, 104 S.Ct. at 3483 ("The purpose of deportation is not to punish past transgressions, but rather to put an end to a continuing violation of the immigration laws."); *American-Arab*, 119 S.Ct. at 947 ("Even when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act (criminal charges may be available for that separate purpose) but is merely being held to the terms under which he was admitted. And in all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law.").

The fact that deportation cannot be immediately effectuated would not seem to recreate a distinction in the government's interest regarding excludable aliens and resident aliens. When deportation is somehow blocked, the government must worry about two things. If the alien is not detained, he may commit crimes against the general population—crimes he would have been unable to commit had the decision to deport been effectuated. The whole *point* of earmarking criminal aliens for deportation or exclusion is that while we must tolerate a certain risk of recidivism from our criminal citizens, we need not be similarly generous when it comes to those who have not
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those who have not achieved citizenship. Their presence in this country is thus a continuing violation of the immigration laws, and if the preferred method of ending this violation is unavailable, detention may be an acceptable alternative mechanism to achieve the ultimate goal. *See Gisbert*, 988 F.2d at 1442 (noting protection of society from potentially dangerous alien was a rational, nonpunitive purpose for detention). *See also Tran v. Caplinger*, 847 F.Supp. 469, 476 (W.D.La.1993) ("This court can find no logical basis to conclude that the detention of a deportable alien under these circumstances is 'punishment' while the detention of an excludable alien is not").[19] In addition, when deportation becomes feasible, the alien may frustrate the process by disappearing within the country, as so many have done. If the government's efforts eventually make deportation feasible, it will be unable to effectuate its decision to expel if the alien has fled and gone underground in the interim. These interests are both equally potentially present regardless of whether an alien was once resident or excludable.

[27] Once the decision is made to deport a resident alien, then, there is little, if any, difference in the government's interest in effectuating deportation of a resident alien and expulsion of an excludable alien. There is thus nothing to adequately distinguish the plenary interest from the one encountered in *Gisbert*. To the extent that Zadvydas had greater rights than the excludable aliens there, such rights were, so far as here relevant, procedural rights respecting the deportation decision, and have concededly been honored. We hold that the government may detain a resident alien based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place.[20]

Conclusion

For the reasons stated, the judgment of the district court is

REVERSED.

19. Pre-trial detention of citizens charged with a serious crime—but presumptively innocent—may be justified by the government's interest in protecting the public. *See United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 2103, 95 L.Ed.2d 697 (1987). The Court has allowed indefinite detention of a citizen as long as there has been a finding of continued danger and "some additional factor" is present. *See Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 2080, 138 L.Ed.2d 501 (1997). In *Hendricks*, the special circumstance or additional factor was a diagnosis of pedophilia, and the Court upheld a statute that allowed indefinite detention of such persons as long as periodic review was available to certify that the detainee remained dangerous and mentally ill. *Cf. Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 1788, 118 L.Ed.2d 437 (1992) (indefinite detention of person acquitted by reason of insanity after medical diagnosis indicated he was no longer mentally ill could not be justified by danger alone). *See also Gisbert*, 988 F.2d at 1441 n. 6 (distinguishing *Foucha* on the grounds it involved a citizen and a case where "the basis for holding him in that facility had ceased to exist"). We note this only to demonstrate that detention of certain classes of persons to protect society at large is not wholly alien to our constitutional order and has been allowed in special situations when, as here, there are procedures to insure that detention must be periodically reviewed.

20. We are aware of the recent joint opinion of five district judges in the Western District of Washington in *Binh Phan et al. v. Reno et al.* (Nos. C98-2342, C99-177C, C99-185R, C99-341WD, & C99-151L, W.D. Wash. July 9, 1999), which reaches a contrary result. We decline to follow that decision because it rests on a categorical distinction between the detention pending expulsion of deportable aliens who have been finally and properly ordered deported and the detention pending expulsion of excludable aliens who have been finally and properly ordered removed, a distinction which for these purposes we have rejected for the reasons stated in the text.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-31345

U.S. COURT OF APPEALS
FILED
OCT 13 1999
CHARLES R. FULBRUGE III
CLERK

KESTUTIS ZADVYDAS

Petitioner - Appellee

v.

LYNNE UNDERDOWN; U S IMMIGRATION AND NATURALIZATION SERVICE,

Respondents - Appellants

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC

(Opinion 8/11/99, 5 Cir., _____, _____ F.3d _____)

Before GARWOOD, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

No. 99-7791

Supreme Court, U.S.
FILED
MAY 15 2000
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

KESTUTIS ZADVYDAS, PETITIONER

v.

LYNNE UNDERDOWN AND
IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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42 pp

QUESTION PRESENTED

Whether the Immigration and Naturalization Service's (INS) continued detention of an alien who is subject to a final order of deportation but whose deportation cannot be effectuated immediately, violates substantive due process, where the alien's custody is reviewed automatically by the INS on a periodic basis to determine whether he would present a danger to society or a flight risk if released.

IN THE SUPREME COURT OF THE UNITED STATES

No. 99-7791

KESTUTIS ZADVYDAS, PETITIONER

v.

LYNNE UNDERDOWN AND
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TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B at 279-297) is reported at 185 F.3d 279. The opinion of the district court (Pet. App. A at 1-17) is reported at 986 F. Supp. 1011.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1999. A petition for rehearing was denied on October 13, 1999. Pet. App. C at 1. The petition for a writ of certiorari was filed on January 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner was born in a displaced persons camp in Germany in 1948. His parents were both from Lithuania. In 1956, petitioner immigrated with his family to the United States and became a resident alien. Despite his long residence in the United States, petitioner never became a citizen of this country. Pet. App. B at 283, 291.

On December 8, 1966, petitioner was convicted of attempted robbery, third degree, in New York state court. Pet. App. A5. Petitioner was sentenced to six years' imprisonment and served five years of that sentence. C.A. R.E. Exh. 8, at 3. On August 31, 1973, petitioner was arrested on auto theft charges and ultimately was convicted on the basis of a guilty plea. Id. at 4. In 1974, petitioner was convicted on charges of attempted burglary, third degree, in New York state court. Pet. App. A at 5. He was sentenced to one and a half to three years' imprisonment. C.A. R.E. Exh. 8, at 4. Petitioner "admitted that he had failed to appear three times on the burglary charge in the 1970's." C.A. R.E. Exh. 6, at 3. During his subsequent incarceration on the burglary charge, petitioner was punished for escape based on his violation of the terms of a furlough or work release program by returning several days late. C.A. R.E. Exh. 8, at 4.[1]

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[1] Petitioner's early criminal history also reflects a juvenile record, a charge of car theft in 1964, and a trespass conviction in 1975. C.A. R.E. Exh. 6, at 2-3.

b. On July 6, 1977, the Immigration and Naturalization Service (INS) issued petitioner an order to show cause why he should not be deported. Pet. App. A at 5. INS charged petitioner with being deportable under 8 U.S.C. 1251(a)(4) (1976), as an alien who had been convicted of two crimes involving moral turpitude. C.A. R.E. Exh. 5, at 2 & n.1. Petitioner applied for relief from deportation under 8 U.S.C. 1182(c) (1976). C.A. R.E. Exh. 5, at 2-3.

On July 13, 1977, INS granted petitioner release on his own recognizance pending disposition of his deportation proceeding. Pet. App. A at 5. According to the conditions of his release, petitioner was required to obtain INS's permission before changing his place of residence, to report to INS any change of address or employment, and to report to the INS office in New York on August 31, 1977. C.A. R.E. Exh. 8, at 5.

An immigration judge (IJ) remanded petitioner's case to the INS for adjudication of petitioner's application for relief under 8 U.S.C. 1182(c) (1976). C.A. R.E. Exh. 8, at 5. That application was ultimately denied by INS on February 10, 1982. Ibid. In July 1982, INS notified petitioner that his hearing before an IJ was rescheduled for August 25, 1982. Pet. App. A at 5. Petitioner failed to appear for the hearing. Ibid.

INS's attempts to locate petitioner were unsuccessful. He was not heard from again until he was arrested ten years later, in 1992, in Houston, Texas, on drug charges for which he had been

initially arrested in Virginia in 1987. Pet. App. A at 5. Petitioner had fled from Virginia to avoid the drug charges, C.A. R.E. Exh. 8, at 4, and "was in hiding from 1987 until he surrendered himself to the [Texas] authorities in 1992." C.A. R.E. Exh. 6, at 3.

On August 17, 1992, petitioner was convicted in Virginia state court of possession of 474 grams of cocaine with intent to distribute it. Pet. App. A at 5; Pet. App. B at 283. He was sentenced to sixteen years' imprisonment, with six years suspended. Petitioner served two years' imprisonment on that sentence and was then released on parole in January 1994 to the custody of the INS. Pet. App. A at 5; Pet. App. B at 283.

2. a. On January 24, 1994, INS issued petitioner an order to show cause why he should not be deported, charging him with being deportable under 8 U.S.C. 1251(a)(2)(A)(ii) (Supp. V 1993), as an alien convicted of two crimes involving moral turpitude; under 8 U.S.C. 1251(a)(2)(B)(i) (Supp. V 1993), as an alien convicted of a controlled substance offense; and under 8 U.S.C. 1251(a)(2)(A)(iii) (Supp. V 1993), as an alien convicted of an aggravated felony. C.A. R.E. Exh. 9, at 1-2.

INS detained petitioner under 8 U.S.C. 1252(a)(2) (Supp. V 1993) pending completion of the deportation proceedings, based on his conviction of an aggravated felony. C.A. R.E. Exh. 6, at 1. Petitioner requested redetermination of his custody status, and a bond redetermination hearing was held by an IJ on February 28,

1994. Ibid.

On March 14, 1994, the IJ denied petitioner's requested change in bond. C.A. R.E. Exh. 6, at 1-4. The IJ noted that, in order to obtain release under 8 U.S.C. 1252(a)(2)(B)(Supp. V 1993) during the pendency of deportation proceedings, petitioner bore the burden of establishing that he was lawfully admitted, not a threat to the community, and likely to appear at any scheduled hearings. C.A. R.E. Exh. 6, at 2. The IJ denied petitioner release based on the flight risk he posed. The IJ determined that petitioner's five-year flight from prosecution on the drug charges and information brought out on cross-examination of petitioner, apparently including an arrest by the FBI for flight to avoid prosecution, cast serious doubt on the likelihood that petitioner would appear at future hearings. Id. at 3. On April 8, 1994, the Board of Immigration Appeals dismissed petitioner's appeal from that decision. C.A. R.E. Exh. 7, at 1.

b. Meanwhile, the deportation proceedings continued on the merits. At a hearing before an IJ on March 29, 1994, petitioner admitted all allegations and was found deportable as charged. Pet. App. A at 5. Petitioner applied for a waiver of deportation under 8 U.S.C. 1182(c) (Supp. V 1993). A hearing on the waiver application was held on April 26, 1994. Pet. App. A at 5.

On May 2, 1994, the IJ issued a decision denying petitioner relief from deportation. C.A. R.E. Exh. 8, at 1-10. Because petitioner entered the United States before 1972, the IJ

considered whether petitioner qualified for registry under 8 U.S.C. 1259 (1988 & Supp. V 1993), but determined that petitioner could not meet the statutory requirement of good moral character because of his conviction of an aggravated felony. C.A. R.E. Exh. 8, at 2.

The IJ also denied petitioner's request for a waiver under 8 U.S.C. 1182(c) (Supp. V 1993). The IJ first recognized as favorable factors petitioner's family ties in the United States and his residency here for over 37 years, and found that petitioner had thus demonstrated outstanding equities in his favor and that he would suffer extreme hardship if deported to Germany. C.A. R.E. Exh. 8, at 8-9. The IJ concluded, however, that petitioner's favorable equities were "diminished by [petitioner's] criminal history which began in June of 1966 and spans 27 of his 37 years of residence. For most of the last 27 years, [petitioner] has been either engaged in criminal activity, in prison, or a fugitive." Id. at 8. The IJ noted that none of petitioner's many family members in the United States provided any affidavits or testimony in support of petitioner, which led the IJ to question the strength of petitioner's relationship with those family members. Ibid. The IJ also observed that petitioner's repeated incarceration had previously kept him separated from his family. Ibid. The IJ could not find that petitioner had made a showing of genuine rehabilitation, taking note of petitioner's minimization of his participation in the

1987 drug-trafficking scheme, and "of the fact that [petitioner] absconded during the pendency of deportation proceedings in 1973, abused the privilege of a supervised release from prison in 1976, fled to avoid prosecution in 1987, and was a fugitive from justice from 1987 until 1992." Id. at 9. The IJ therefore concluded that a favorable exercise of discretion was not warranted in this case. Ibid.

At the time of the deportation hearing, it was believed that petitioner was a citizen of Germany, C.A. R.E. Exh. 8, at 1; see also Sept. 27, 1996, Tr. 42 (petitioner testified that he thought that he was a German citizen until he and INS learned otherwise), and the IJ ordered that petitioner be deported to Germany. C.A. R.E. Exh. 8, at 10. Petitioner did not appeal that decision, and it accordingly became final. Pet. App. B at 283.

3. In May 1994, an INS official began the process for obtaining travel documents from Germany so that INS could effectuate petitioner's deportation. Pet. App. A at 5. After INS's submission of the necessary application to the German Consulate, Germany informed INS on June 28, 1994, that it had determined that petitioner is not a German citizen. Ibid.; C.A. R.E. Exh. 5, at 5.

On July 26, 1994, INS sent a formal written request to the Lithuanian Consulate for a travel document for petitioner based on his Lithuanian parentage. C.A. R.E. Exh. 5, at 5. On August 22, 1994, the Lithuanian Consulate responded by refusing to issue

petitioner a travel document because he is not a citizen or permanent resident of Lithuania. Ibid.; Pet. App. B at 284. On October 3, 1994, INS Headquarters formally requested permission from Lithuania for the return of petitioner to that country. C.A. R.E. Exh. 5, at 5.

4. On January 9, 1995, petitioner filed a motion to reopen his deportation proceedings, contending that he is eligible for a waiver of deportation under 8 U.S.C. 1182(c) (Supp. V 1993). C.A. R.E. Exh. 9, at 2. On January 19, 1995, an IJ denied the motion because it was not accompanied by an application for relief under Section 1182(c), and because petitioner could not make a prima facie showing of eligibility for the relief requested. Id. at 3.

5. INS continued its efforts to obtain travel documents for petitioner from Germany. The German Consulate obtained further information and engaged in additional research, but ultimately again denied the request in May 1995. C.A. R.E. Exh. 5, at 5-6; Pet. App. B at 284.

In October 1996, INS again contacted the Lithuanian Consulate, this time to determine how a person could obtain Lithuanian citizenship if he was born of Lithuanian parents in another country. Pet. App. B at 284. INS was informed that petitioner could apply for citizenship if he could prove that his parents were born in Lithuania before 1940. Id. at 284, 292. On April 23, 1997, INS forwarded another formal request for travel

documents to the Consulate of Lithuania. INS enclosed documents reflecting the baptism of petitioner's mother and the marriage of petitioner's parents in Lithuania. C.A. R.E. Exh. 11, at 1-2. Subsequently, the Lithuanian government provided additional information about the type of documentation that petitioner should present to it. Pet. App. B at 284.[3]

6. Meanwhile, in September 1995, petitioner commenced the instant action by filing a petition for a writ of habeas corpus under 28 U.S.C. 2241, contending that his continued detention violated the Eighth Amendment, due process, and international law. Pet. App. B at 284.

a. On February 3, 1997, a magistrate judge issued a report recommending that the petition be denied. C.A. R.E. Exh. 5, at 1-24. The magistrate judge found that petitioner's continued detention under 8 U.S.C. 1252(a)(2)(A) and (B) (1994) was "statutorily authorized and does not constitute an abuse of the Attorney General's broad discretion in immigration matters," C.A. R.E. Exh. 5, at 7. The magistrate judge held that petitioner's detention did not violate substantive due process because the purpose of his detention was not punishment, but rather was to further the government's compelling interest in protecting the community and its legitimate interest in preventing aliens from

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[3] In addition, INS issued an unsuccessful request for travel documents to the Consulate of the Dominican Republic because petitioner's wife is a native of that country. Pet. App. B at 284.

absconding before they are deported. Id. at 10-15. The magistrate judge also held that petitioner was not being unlawfully imprisoned for an indefinite time in violation of international law or the Eighth Amendment because INS's efforts to effectuate his deportation were ongoing. Id. at 22-23.

b. On October 30, 1997, the district court issued an order granting petitioner habeas relief, Pet. App. A at 1-17, holding that his continued detention violated substantive due process, id. at 13-17. As a threshold matter, the court held that petitioner's detention was consistent with INS's statutory authority under 8 U.S.C. 1252(a)(2)(A) and (B) (1994) because, "[c]onsidering petitioner's recidivist history and his prior episode of 'bond jumping,' petitioner has not met his burden of proving that he is not a threat to the community and that he is likely to appear for scheduled hearings." Id. at 14. The court noted that Congress nowhere placed a time limit on the detention of aggravated felons, such as petitioner, who cannot meet the statutory standards for release and whose immediate deportation is not possible. Ibid.

Turning to the constitutional claim, the district court recognized that "protecting the community from aggravated felons and preventing aliens from absconding before deportation are legitimate governmental policy goals that, can warrant a deprivation of liberty under the proper circumstances." Pet. App. A at 15 (internal quotation marks omitted) (citing United

States v. Salerno, 481 U.S. 739 (1987)). The court held, however, that "petitioner's detention of nearly four years with no end in sight, and the probability of permanent confinement, is an excessive means of accomplishing the purposes sought to be served" by 8 U.S.C. 1252(a) (1994). Pet. App. A at 16. The court also held that petitioner's detention could not be characterized as temporary because petitioner "will never be deported because there is no place to send him." Ibid. Petitioner was then released under conditions imposed by the district court. Pet. App. B at 284.[3]

7. The court of appeals reversed. Pet. App. B at 279-297. The court first reviewed the various statutory regimes that have governed immigration detention over the past several years and agreed with INS that petitioner's current detention is governed by 8 U.S.C. 1231(a)(6) (Supp. IV 1998). Pet. App. B at 286-287. The court recognized that Section 1231(a)(6) authorizes detention of criminal aliens like petitioner after entry of a final order of deportation, "but makes it discretionary beyond an initial ninety day period." Id. at 286. The court then analyzed the constitutional question based on the assumption that petitioner

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[3] On December 19, 1997, the district court denied the government's motion to alter or amend the judgment, noting that the court "was fully aware that petitioner is theoretically eligible to be considered for release by the INS and that he may again and again apply to the INS for a change in custody status." C.A. R.E. Exh. 3, at 1. The court stated that that did "not alter the Court's conclusion that this petitioner's detention had no end in sight." Ibid.

will be able to obtain periodic review of his detention under INS regulations, which "authorize the release of such aliens when it is determined that the alien 'is not a threat to the community and is likely to comply with the removal order.'" Id. at 287 (citing 8 C.F.R. 236.1(d), 241.4, and 241.5). The court pointed out that those regulations have been "explained and expounded in the February 3, 1999, 'Memorandum for Regional Directors' from INS Executive Associate Commissioner Michael A. Pearson concerning 'Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable,'" under which INS reviews the custody status of detained aliens every six months to determine whether there has been a change in circumstances warranting release; INS documents the alien's file to show reasons for detention decisions; and if an alien requests a custody review in writing and that request is denied, the alien may appeal that decision to the Board of Immigration Appeals. The court of appeals also noted that "[t]he district court found that the INS did not err in determining that [petitioner] posed a danger to the community and a flight risk," and that "[s]hould [petitioner] no longer do so, he would doubtless be released." Id. at 288.

Next, the court of appeals reviewed the broad authority of the political Branches over immigration matters, noting that it is "largely immune from judicial control" and that "[t]he power of the national government to act in the immigration sphere is

thus essentially plenary." Pet. App. B at 288-289. The court explained that, in Gisbert v. U.S. Attorney General, 988 F.2d 1437, 1448, amended by 997 F.2d 1122 (5th Cir. 1993), it had held, in accordance with those principles, "that excludable aliens may be detained pending deportation without such detention constituting unconstitutional punishment, even when the aliens' country of origin indicates it will not accept their return." Pet. App. B at 290 (also citing Barrera-Echavarria v. Rison, 44 F.3d 1441, 1450 (9th Cir.) (en banc), cert. denied, 516 U.S. 976 (1995) (accord with Gisbert)). The court explained that, "[d]rawing on the reasoning of Mezei," it had found in Gisbert that "detention pending deportation does not constitute punishment, since the detention could rationally be seen as a necessary byproduct of the need to expel an unwanted alien rather than a punitive decision." Ibid.

The court rejected petitioner's attempt to distinguish his case from Gisbert and Mezei on the ground that, unlike the aliens involved in those cases who were excludable aliens because they were stopped at the border and not allowed entry, petitioner had previously been admitted for permanent residence. The court recognized that petitioner's status as a resident alien entitled him to greater procedural due process during the deportation proceedings themselves, in which the IJ determined whether petitioner would retain his permanent resident status. But the court did "not believe that the difference between excludable

aliens and resident aliens mandates a radical departure from the reasoning of Gisbert when, as here a final decision to deport the once resident alien has been made and stands unchallenged." Pet. App. B at 290. The court emphasized that, when a permanent resident alien becomes the subject of a final order of deportation, that alien is no longer a permanent resident, and "[t]he need to expel such an alien is identical, from a national sovereignty perspective, to the need to remove an excludable alien who has been finally and properly ordered returned to his country of origin." Id. at 296. The fact that the government cannot immediately effectuate a deportation does not alter the analysis, the court reasoned, because, regardless of whether the alien is a former resident or is excludable, the government has an interest in protecting society from any threat to the community or risk of flight that the alien's release would pose. Id. at 296-297.

The court also ruled that the district court "considerably overstate[d] the matter" when it characterized petitioner's continued detention as permanent. Pet. App. B at 291. It pointed to the regulatory procedures for automatic, periodic administrative review of petitioner's detention and the fact that the Ninth Circuit has held that an analogous regulatory scheme for review meant that an alien's detention is not indefinite or permanent. Ibid. (citing Barrera-Echavarria, 44 F.3d at 1450). The court also found that it would be premature to conclude that

petitioner will never be deported. The court recounted the various communications between INS officials and Lithuania and concluded that "[c]ertainly there has been no definitive denial by Lithuania of any application for citizenship by [petitioner]." Id. at 292-293. The court also noted two other possibilities that remained to be explored -- a different claim of German citizenship based on ethnic German ancestry through petitioner's mother, and a claim of Russian citizenship because of Russia's control over Lithuania at one point and the fact that some of petitioner's relatives apparently live there. Id. at 293-294. The court reasoned that, "[g]iven the traditional deference we show to the other branches in matters of immigration policy, judicial intrusion should not be considered, particularly where there are reasonable avenues for parole, until there is a more definitive showing that deportation is impossible, not merely problematical, difficult, and distant." Id. at 294.

ARGUMENT

Petitioner contends that the court of appeals erred in upholding the constitutionality of petitioner's detention by the Immigration and Naturalization Service (INS). The decision of the court of appeals is correct, however, and it does not warrant review by this Court.

1. Subsequent to the filing of the certiorari petition in this case, the Tenth Circuit issued a decision in accord with the decision below. In Ho v. Greene, 204 F.3d 1045 (2000), the Tenth

Circuit held, inter alia, that once a final order of deportation has been entered against a resident alien, that alien has no greater right with respect to release into this country than does an alien seeking to enter the country for the first time. Id. at 1058-1059 (citing Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953)). The Tenth Circuit therefore concluded that such an alien does not have a liberty interest in being admitted to the United States and that there is no substantive or procedural due process impediment to the continued detention. Id. at 1059-1060. No court of appeals has held to the contrary on the constitutional issue.

More recently, the Ninth Circuit issued a decision granting habeas relief in a similar case, but based on statutory rather than constitutional grounds. In Ma v. Reno, No. 99-35976, 2000 WL 358445 (Apr. 10, 2000), the Ninth Circuit construed 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to preclude INS detention of an alien beyond the statutory 90-day removal period following entry of a final order of removal if "there is no reasonable likelihood that the alien will be removed in the reasonably foreseeable future." Ma, 2000 WL 358445, at *1.

Although the result in Ma is inconsistent with the result reached by the Fifth Circuit in this case, the Fifth Circuit did not address the statutory issue decided by the Ninth Circuit in Ma, and the Ninth Circuit in Ma did not reach the constitutional issue decided by the Fifth Circuit in this case. There

accordingly is no conflict between the Fifth Circuit and the Ninth Circuit on either the statutory issue or the constitutional issue. The Tenth Circuit in Ho, however, did reject the statutory argument, later adopted by the Ninth Circuit in Ma, that an implicit time limit on an alien's continued detention should be read into 8 U.S.C. 1231(a)(6) (Supp. IV 1998). 204 F.3d at 1057. The Tenth Circuit held that Section 1231(a)(6) "expressly allows for continued detention beyond the removal period with no time limit placed on the duration of such detention," and it declined to "substitute its judgment for that of Congress." Ibid.[4] We agree with the Tenth Circuit (see id. at 1055-1057) and believe that the Ninth Circuit's contrary statutory ruling is inconsistent with both the plain language of

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[4] The Third Circuit, in Ngo v. INS, 192 F.3d 390 (1999), and the Ninth Circuit, in Barrera-Echavarria v. Rison, 44 F.3d 1441 (en banc), cert. denied, 516 U.S. 976 (1995), have rejected constitutional challenges to long-term detention following final orders of exclusion where the alien's immediate repatriation was not possible or practicable. In Ngo, the Third Circuit held that due process is not violated by continued detention when the alien's country of origin refuses to allow the alien's return, so long as there is a possibility of the alien's eventual departure, there are adequate and reasonable custody review procedures, and detention is necessary to protect the community or prevent flight. 192 F.3d at 397. The Third Circuit cited with approval the ruling in the instant case that "once an order of deportation is final, no distinction exists between the rights of resident aliens and those ordered removed as excludable." Ibid.

In Barrera-Echavarria, the Ninth Circuit sitting en banc held, in the similar context of excludable Mariel Cubans whose immediate repatriation is not possible, that continued detention of an alien is constitutional where the alien is afforded the opportunity, on an annual basis, to demonstrate to the INS that he would no longer pose a threat to the community or a flight risk if released. 44 F.3d at 1450.

the statute and the history of the provision and its predecessor statutes, which indicates that Congress has embraced prior administrative practice and the weight of judicial authority sustaining the Attorney General's detention authority under similar conditions. The Ninth Circuit also failed to afford the Attorney General's interpretation the deference it is due under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

In light of the conflicting rulings by the Ninth and Tenth Circuits on the antecedent question of statutory interpretation, review by this Court of the constitutional issue in the instant case would be premature. This case, moreover, would be an inappropriate vehicle for consideration of the statutory argument accepted in Ma. That argument was not addressed in this case by the Fifth Circuit, and the statutory issue is not included in the question presented in the petition or in petitioner's supplemental brief. Review of the statutory issue by this Court would in any event be premature as well. The United States has filed a petition for rehearing en banc in the Ninth Circuit in the Ma case, which, if granted, could lead to elimination of the disagreement between the Ninth and Tenth Circuits on the statutory issue. It is significant for purposes of en banc review in Ma that the Ma panel ruled on the statutory issue without benefit of briefing by the parties on that issue and without the benefit of any consideration of that issue by the

district court in that case.[5] For these reasons, the Ninth Circuit's decision in Ma on the statutory issue does not warrant review of the constitutional issue in this case.

2. Petitioner's insistence (Pet. 9, 13-17) that lawful permanent resident aliens possess greater constitutional rights than do excludable aliens with respect to their continued detention following entry of a final order of removal ignores the fact that petitioner is no longer a lawful permanent resident alien. Once a final order of deportation was entered against petitioner, that status was extinguished. See 8 U.S.C. 1101(a)(20) and (47)(B)(ii) (1994 & Supp. IV 1998); 8 C.F.R. 1.1(p); 3.39, 241.1; Pet. App. B at 296 ("When a former resident alien is * * * finally ordered deported, the decision has irrevocably been made to expel him from the national community. Nothing remains but to effectuate this decision."). The forfeiture of that right, in turn, has extinguished any right petitioner had as a lawful permanent resident to be at large in the United States.

The court of appeals properly held that such a former resident alien awaiting execution of an order of removal stands essentially on the same footing as an excludable alien who has been ordered removed after seeking to enter the United States for the first time. Pet. App. B at 297. Like an excludable alien,

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[5] One of the habeas petitioners has requested rehearing en banc in the Tenth Circuit in the Ho case.

petitioner no longer has any legal right to be present in the United States. The United States' interest in effectuating his return to another country is the same as its interest in returning excludable aliens -- it is based on the United States' interest in protecting its national sovereignty and not allowing recalcitrance on the part of another country in accepting the return of its citizens to dictate the presence of foreign nationals at large in this country. Moreover, as the court of appeals recognized, the alien's lack of a right to be present in the United States and the government's countervailing interests in protecting against danger to the community and effectuating removal are the same in the two situations. Pet. App. B at 288-290, 294-297.

3. This Court has held that Congress's plenary power over immigration derives from the "inherent and inalienable right of every sovereign and independent nation" to determine which aliens it will admit or expel. Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893); see also Reno v. Flores, 507 U.S. 292, 305 (1993). Contrary to petitioner's contention (Pet. 10, 17-21), Congress's plenary power over immigration encompasses matters of immigration detention. This Court has recognized the authority of Congress and the Executive Branch to detain an alien as a means of enforcing their decision that the alien is not entitled to be admitted into the United States. See Mezei, 345 U.S. at 216; cf. United States v. Salerno, 481 U.S. 739, 748 (1987)

("Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons. Thus, we have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings."). Accordingly, the Court has adopted a very deferential standard of review in cases involving the Attorney General's immigration detention authority. Carlson v. Landon, 342 U.S. 524, 540 n.33 (1952); Flores, 507 U.S. at 309.

The court of appeals correctly held that immigration detention relates to the conduct of foreign policy and thus warrants substantial deference. See Pet. App. B at 294. This Court has stated that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power." Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952). And as both the Fifth Circuit in the instant case and the Third Circuit in Ngo emphasized in considering the constitutionality of continued detention of aliens awaiting removal, even though aliens can claim some constitutional protections, "[t]he power of the national government to act in the immigration sphere is * * * essentially plenary," and, as such, is "'largely immune from judicial * * * interference.'" Pet. App. B at 289 (quoting Harisiades, 342 U.S. at 589); see also Ngo, 192 F.3d at 395. The detention of aliens for the purpose of facilitating their removal

implicates the same foreign policy concerns that have led this and other courts to eschew intervention in the past. See, e.g., Mezei, 345 U.S. at 216; Barrera-Echavarria, 44 F.3d at 1448. As the Fifth and Ninth Circuits have recognized, critical foreign policy implications arise if another country can force the United States to allow that country's nationals to be at liberty in the United States by refusing to allow them to return. See Gisbert, 988 F.2d at 1447 ("The United States cannot be forced to violate its national sovereignty in order to parole [criminal] aliens within its borders merely because [the native country] is dragging its feet in repatriating them."); Barrera-Echavarria, 44 F.3d at 1448 ("Reading a time limit on detention [of excludable aliens] would risk frustrating the government's ability to control immigration policy and relations with foreign nations."); see also Mezei, 345 U.S. at 216 ("Congress may well have felt that other countries ought not shift the onus to us; that an alien in respondent's position is no more ours than theirs."); cf. INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) ("[W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations'"; "The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.").

4. Petitioner challenges (Pet. 11-12, 21-23) the court of

appeals' characterization of the liberty interest at stake, but he does not identify any authority from this Court to support his apparent claim (Pet. 23-28) of an entitlement, as a former resident alien, to a liberty interest akin to that of a citizen.

As the court of appeals pointed out, petitioner did not challenge the ruling by the district court that "the INS did not err in determining that [petitioner] posed a danger to the community and a flight risk," and petitioner will be released in the future if he persuades the INS that he no longer presents those risks. Pet. App. B at 288. Moreover, petitioner disregards his extended history of absconding from the jurisdiction of INS and the courts and of eluding government authorities. See pp. 2-4, 5, 6-7, supra (recounting petitioner's failure to appear at a scheduled immigration hearing and subsequent lack of contact with INS for ten years; his violation of conditions imposed on his immigration release, including his obligation to keep INS apprised of his current residence; his failure to appear at a state court criminal proceeding; his violation of the conditions of release when on a furlough or work release program; his absconding from a state criminal prosecution; and his remaining in hiding for five years as a fugitive from law enforcement). Petitioner's belated attempt to refute the finding of dangerousness (Pet. 25 n.7) also ignores his serious criminal history, including his most recent conviction for possession of 474 grams of cocaine with intent to

distribute it. Pet. App. B at 283.

The court of appeals correctly recognized that the government's interest in detaining petitioner in these circumstances is in ensuring that the Attorney General is free to exercise her statutorily delegated authority to ensure that aliens will not flee if released and to afford adequate protection to the community against further criminal conduct by persons who have no lawful right to be in the United States. Pet. App. B at 296-297; cf. Doherty v. Thornburgh, 943 F.2d 205, 211 (2d Cir. 1991) ("Detention of Doherty is not an end in itself sought by the Attorney General; rather, bail has been denied in order to preserve the government's ability to later carry out its broader responsibilities over immigration matters."), cert. dismissed, 503 U.S. 901 (1992). Congress has assigned that responsibility not to the courts in the first instance, based on a de novo weighing of the factors, but to the Attorney General, subject to review by the courts on habeas corpus only under a highly deferential standard of review. Flores, 507 U.S. at 306; Carlson, 342 U.S. at 538-541.

Petitioner nonetheless argues, based on his prediction that he will never be deported, that his detention is unconstitutionally indefinite. Pet. 24-27. That assessment, which is contrary to the considered judgment of the Executive Branch, is both erroneous and legally insufficient to render petitioner's detention in the present circumstances a violation

of substantive due process. As the Fifth Circuit explained, petitioner's detention cannot fairly be characterized as indefinite or permanent, Pet. App. B at 291, 294, in light of (a) the existence of procedures, recently augmented by INS and sustained by the Third Circuit in Ngo, that provide for a periodic and meaningful review of petitioner's custody, and (b) the possibility that continued diplomatic efforts with Lithuania, Germany, or Russia might eventually result in petitioner's deportation. See also Ngo, 192 F.3d at 397.

a. Under 8 U.S.C. 1231(a)(6) (Supp. IV 1998), the Attorney General may, following the initial 90-day removal period, in the exercise of her discretion, release a detained alien who is subject to a final order of removal, if she determines that the alien is neither a risk to the community nor unlikely to comply with the order of removal. Under current regulations, aliens like petitioner may request a formal custody review by the INS district director at any time and may appeal any resulting denial to the Board of Immigration Appeals (BIA). See 8 C.F.R. 236.1(d)(2)(ii) and (3)(iii), 241.4, 241.5. In determining whether an alien shall be released from detention, the district director may consider: the nature and seriousness of criminal convictions; other criminal history; sentence(s) imposed and time actually served; history of failures to appear; probation history; disciplinary problems while in custody; evidence of rehabilitative efforts or recidivism; equities in the United

States; and prior immigration violations and history. 8 C.F.R. 241.4.

As a supplement to that regulatory procedure for an alien to request release, INS established procedures in February 1999 under which the custody status of detained aliens whose removal is not immediately practicable will be subject to automatic review during the initial 90-day removal period and (if the alien is not released) every six months thereafter.[6] February 3, 1999 Memorandum For Regional Directors from Executive Associate Commissioner Michael A. Pearson (Pearson I) (attached as App. A, infra); see Pet. App. B at 287.

In addition, in August 1999, the Commissioner of INS instituted further procedures, which include centralized review of the custody status of detained aliens such as petitioner. See August 6, 1999 Memorandum For All Regional Directors from Executive Associate Commissioner Michael A. Pearson (Pearson II) (attached as App. B, infra).[7] Those new interim procedures, which were effective immediately and were intended to operate

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[6] Because petitioner was released in December 1997 pursuant to the district court order, the question of his detention has not been reviewed by INS under these supplementary procedures.

[7] The Attorney General and the Commissioner also announced their intention to issue regulations establishing a formal custody review program for such aliens modeled after the regulations establishing the Cuban Review Plan, which governs custody review of excludable Mariel Cubans whose repatriation to Cuba is not currently possible or practicable. See 8 C.F.R. 212.12. We have been informed that INS is finalizing the proposed regulations and intends to publish them soon for notice and comment.

pending anticipated permanent changes to the regulations themselves (see note 7, supra), instituted a two-level custody review for aliens subject to detention under Section 1231(a)(6) after the initial 90-day removal period. Under the interim procedures, the district director continues to conduct an initial custody review of an alien during the 90-day removal period, as described above, for aliens whose removal is unlikely to occur during the removal period. App. B, infra, 5a.

If the district director decides that the alien should be detained after the 90-day removal period, the next scheduled review by the district director is nine months from the date of the final removal order, or six months after the last custody review, whichever is later. App. B, infra, 6a. Written notice must be given to the alien 30 days in advance of the review, informing the alien of the factors that will be considered in making a custody determination and explaining that the alien will have an opportunity to demonstrate that he is not a flight risk or a danger to the community. Ibid.; see also 8 C.F.R. 241.4. An interview of the alien is mandatory at that custody review. The district director's determination following the interview is subject to review by a specialized team in INS Headquarters, in order to ensure an independent assessment outside the local district and consistency of decisions. App. B, infra, 6a-7a. The Headquarters panel may ratify the district director's decision, return the case to the district director for

reconsideration, or determine that additional information is required. Ibid. After the district director reviews his decision in light of INS Headquarters' evaluation, the district director notifies the alien of the final custody determination within 30 days of completion of the Headquarters review. Ibid.

INS thereafter conducts custody reviews every six months, alternating between a district director file review, and then a review that includes an interview at the alien's request and INS Headquarters review. App. B, infra, 6a. In either case, the alien must receive written notification of the final custody decision within 30 days of that decision. Ibid.

The comprehensive administrative procedures for review of the detention of petitioner and those similarly situated foreclose any characterization of his detention as permanent or indefinite. As the Third Circuit held in Ngo, the new interim procedures "provide reasonable assurance of fair consideration" of an alien's suitability for release pending his removal from the United States. 192 F.3d at 399.

b. The court of appeals also correctly ruled that it cannot "now be said with any real assurance" that petitioner "will never be deported" to his home country. Pet. App. B at 291. Because diplomatic efforts to arrange for petitioner's repatriation are continuing, and the court of appeals properly deferred to the Executive Branch in this matter of immigration and foreign policy, further review is not warranted.

Diplomatic efforts are committed by the Constitution to the Executive Branch, which -- because of its special expertise and access to information -- is responsible for bringing about their success and is best situated to predict whether that will happen. Petitioner's administrative detention by INS is consistent with the longstanding recognition that "[p]roceedings to exclude or expel [aliens] would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation." Wong Wing v. United States, 163 U.S. 228, 235 (1896). The Court has since reaffirmed that Congress may vest release determinations regarding aliens subject to deportation in the Attorney General, subject to only the most deferential standard of review, Carlson, 342 U.S. at 537-542, and that there is "no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings." Salerno, 481 U.S. at 748.

Having reviewed the voluminous record provided by the petitioner and the government, the Fifth Circuit provided a detailed summary of INS's efforts to remove petitioner to either Lithuania or Germany. Pet. App. B at 291-294. It then concluded that, even if petitioner's removal may seem "problematical, difficult, and distant" in the present circumstances, that is not sufficient -- "[g]iven the traditional deference [courts] show to the other branches in matters of immigration policy" -- for

petitioner to meet his very high burden of showing that "deportation is impossible." Id. at 294. See also Ngo, 192 F.3d at 398 (concluding "[i]t is extremely unlikely" that the prolonged detention of an excludable alien from Vietnam would be permanent, in light of the diplomatic efforts between the United States and Vietnam to negotiate a repatriation agreement, even though the court characterized the negotiations as proceeding at an "agonizingly slow" rate).

Further, as the Fifth Circuit properly recognized, the courts should be especially reluctant to second-guess Executive Branch judgments regarding the prospects of deporting an alien both because of the Executive's greater expertise and access to all the relevant information and communications, and because of the need for the nation to speak with one voice on such matters. Pet. App. B at 295-297; see Aguirre-Aguirre, 526 U.S. at 425. Permitting the release of a former resident alien based on an ad hoc judicial determination regarding the probable length of his future detention would intrude into an area of confluence between the Executive's responsibilities for immigration law enforcement and diplomacy, signaling to other nations that their refusal to accept the repatriation of detained criminal aliens under final orders of deportation may result in release of the aliens back into American society, and perhaps thereby cause the other nations to ignore or disclaim their responsibility to accept the return of their own nationals who have violated the laws of the

United States. See Barrera-Echavarria, 44 F.3d at 1448 ("A judicial decision requiring that excludable aliens be released into American society when neither their countries of origin nor any third country will admit them might encourage the sort of intransigence Cuba has exhibited in the negotiations over the Mariel refugees."); Jean v. Nelson, 727 F.2d 957, 975 (11th Cir. 1984) (en banc)("[T]his approach would ultimately result in our losing control over our borders. A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back."), aff'd, 472 U.S. 846 (1985). Thus, the Fifth Circuit correctly concluded that, given the government's plenary authority over immigration policy and its interest "in effectuating deportation of a resident alien and expulsion of an excludable alien," the government "may detain a resident alien based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place." Pet. App. B at 297.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2000

APPENDIX A

U.S. Department o ce
Immigration and Nat. ..ation Service

HQCOU 90/16.51

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

FEB 3. 1999

MEMORANDUM FOR REGIONAL DIRECTORS

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable

This memorandum clarifies the authority of District Directors to make release decisions and emphasizes the need to provide a review of administratively final order detention cases both before and after the expiration of the mandatory 90 day detention period at § 241(a)(2) of the Immigration and Nationality Act (INA).

The District Director is required to review every administratively final order removal case before the ninety [90] day removal period mandated by § 241(a)(1) expires. 8 C.F.R. § 241.4 gives the District Director the authority to make release decisions beyond the removal period based on specific criteria in the regulation as set forth below. The regulation also provides that the District Director should provide an alien with the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order. The alien may be given this opportunity in writing, orally, or a combination thereof. The District Director must ensure that the file is documented with respect to the alien's opportunity to present factors in support of his release, and the reasons for the custody or release decision.

The District Director cannot delegate the authority to render the ultimate custody or release decision beyond those directly responsible for detention within his district or Service Processing Center (SPC). Such individuals may include the Deputy District Director, the Assistant Director for Detention, the Officer in Charge (OIC) of a detention center, or persons acting in such capacities. These persons must be specifically designated by the District Director.

Exhibit A

Although the District Director cannot relinquish his decision-making authority, he may utilize various methods to assist in reaching a determination. For example, he may designate an individual or group of individuals to review the alien file and obtain any other relevant information. To the extent Districts have a high volume of post order cases, the District Director may also request detail assistance from other districts, the region and/or headquarters for the purpose of conducting custody reviews. The District Director may use information obtained by local staff or detailees to make his custody decision. Detail assistance may be coordinated through John Castro, at Headquarters Detention and Deportation.

Every six months, the District Director must review the status of aliens detained beyond the removal period to determine whether there has been a change in circumstances that would support a release decision since the 90 day review. Further, the District Director should continue to make every effort to effect the alien's removal both before and after the expiration of the removal period. The file should document these efforts as well.

When an alien is released pursuant to 8 C.F.R. § 241.4 under an order of supervision, the order of supervision must specify the applicable conditions of supervision. In addition, the order of supervision must be signed by one of the parties authorized in 8 C.F.R. § 241.5.

Any alien described in 8 C.F.R. § 241.4(a), may be returned to custody subsequent to release under an order of supervision if such alien violates any of the conditions of the order of supervision. Any alien described in 8 C.F.R. § 241.4(b) who violates the conditions of the order of supervision is subject to the penalties described in § 243(b) of the INA.

District Directors are advised that a detention review is subject to the provisions of 8 C.F.R. § 236.1(d)(2)(ii) if the alien submits a written request to have his detention status reviewed by the District Director. Under 8 C.F.R. § 236.1(d)(2)(iii), the alien may appeal the District Director's decision to the Board of Immigration Appeals. Where the alien has not made a written request to have his custody status reviewed, however, there is no provision for appeal of the District Director's decision to the Board of Immigration Appeals. See 8 C.F.R. § 241.4.

8 C.F.R. § 241.4 Continued detention beyond the removal period.

(a) Continuation of custody for inadmissible or criminal aliens. The district director may continue in custody any alien inadmissible under § 212(a) of the Act or removable under § 237(a)(1)(C), 237(a)(1)(C), 237(a)(2), or 237(a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the

alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:

(1) The nature and seriousness of the alien's criminal convictions;
(2) Other criminal history;
(3) Sentence(s) imposed and time actually served;
(4) History of failures to appear for court (defaults);
(5) Probation history;
(6) Disciplinary problems while incarcerated;
(7) Evidence of rehabilitative effort or recidivism;
(8) Equities in the United States; and
(9) Prior immigration violations and history.

(b) Continuation of custody for other aliens. Any alien removable under any section of the Act other than § 212(a), 237(a)(1)(C), 237(a)(2), or 237(a)(4) may be detained beyond the removal period, in the discretion of the district director, unless the alien demonstrates to the satisfaction of the district director that he or she is likely to comply with the removal order and is not a risk to the community.

Note: these instructions also apply to criminal alien deportation cases under former INA § 242 where the aliens are subject to required detention under current INA § 236(c).
See October 7,1998 memorandum entitled INS Detention Use Policy.

APPENDIX B

U.S. Department of Justice
Immigration and Naturalization Service

HQOPS 50/14.6-C

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

AUG 6 1999

MEMORANDUM FOR ALL REGIONAL DIRECTORS
DISTRICT DIRECTORS
OFFICERS IN CHARGE

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Interim Changes and Instructions for Conduct of Post-order Custody Reviews

This memorandum addresses several changes to current procedures regarding post-order detention procedures for aliens whose immediate repatriation is not possible or practicable.[1] Current regulations, 8 C.F.R. § 241.4, provide that the decision whether to detain or release such an alien is made by the District Director. In the near future, the Service will begin the rulemaking process to propose a program modeled after the Cuban Review Plan of 8 CFR section 212.12 to address post-order custody cases. The custody of Mariel Cubans will continue to be governed by 8 CFR 212.12. Until this more permanent program is implemented, several changes are being made to the current procedures set forth in the memoranda of February 3, and April 30, 1999. These changes are effective immediately. All offices will follow identical procedures in conducting reviews of post-order custody cases, using the forms listed at the conclusion of this memorandum. The forms will be distributed to all offices.

The Attorney General and the Commissioner have agreed that these procedures, as detailed below under the heading "Interim Procedures," will include written notice to the alien of custody reviews. The notice will advise the alien that he may present information supporting a release, and he may be assisted by an attorney or other person at no expense to the government. The alien will receive an in-person interview at the first custody review following expiration of the removal period. Thereafter, the alien will receive a separate notice of the opportunity for an annual interview. The alien will be provided written reasons for INS custody decisions.

[1] See the memoranda from Michael Pearson, Executive Associate Commissioner for Field Operations, February 3, 1999: Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable, and April 30, 1999: Supplemental Detention Procedures.

MEMORANDUM FOR ALL REGIONAL DIRECTORS
DISTRICT DIRECTORS
OFFICERS IN CHARGE

SUBJECT: Interim Changes and Instructions for Conduct of Post-order Custody Reviews

The District Director will continue to make custody determinations within the ninety-day removal period under the memoranda of February 3, and April 30, 1999. The next scheduled review shall be nine months from the date of the final administrative order of removal or six months after the last review, whichever is later. That review will include an interview and is subject to review at INS Headquarters if the District Director has determined that the alien should remain in custody. Thereafter, reviews will be conducted at six-month intervals, alternating between a file review by the District Director (without an interview unless the District Director, in his discretion, determines that one would be useful, and without Headquarters review), and a review with the opportunity for an interview at the alien's request and with Headquarters review.

No case subject to a Headquarters review will be considered a final custody decision until the District level decision has been ratified through the Headquarters review or resolved after referral back to the District. If the Headquarters reviewer concludes that the District Director should reconsider his decision or that further documentation is required to support the District Director's decision, the case shall be forwarded to the Regional Office with a cover memorandum and instructions to refer the case back to the District for further consideration or documentation. The Headquarters reviewer shall detail the issues that resulted in the referral and forward the case to the Regional Office.

Regional Directors are responsible for working with the District Director to comply with the Headquarters instructions on referrals. In addition, the Regional Director is responsible for preparation of statistics on the custody reviews conducted in each district.

INTERIM PROCEDURES

(1) Pursuant to the provisions of 8 C.F.R. § 241.4, the District Director will continue to conduct a custody review of administratively final order removal cases before the ninety-day removal period mandated by § 241(a)(1) expires for aliens whose departure cannot be effected within the removal period.

(2) These procedures apply to any alien ordered removed who is inadmissible under § 212, removable under 237(a)(1)(C), 237(a)(2), or 237(a)(4) or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal. They cover aliens convicted of an aggravated felony offense who are subject to the provisions of old INA § 236(e)(1) – (3), and non-aggravated felon aliens with final orders of exclusion. Mariel Cubans are excluded from these procedures as parole reviews for them are governed by 8 C.F. R. § 212.12. The ninety-day review will be conducted pursuant to the instructions set out in the memoranda of February 3 and April 30, 1999. District Directors may, in their discretion, interview the alien if they believe that an interview would facilitate the custody review.

MEMORANDUM FOR REGIONAL DIRECTORS
DISTRICT DIRECTORS
OFFICERS IN CHARGE

SUBJECT: Interim Changes and Instructions for Conduct of Post-order Custody Reviews

(3) Following expiration of the ninety-day removal period, the next scheduled review provided by the District Director shall be nine months from the date of the final administrative order of removal or six months after the last review, whichever is later. Written notice shall be given to each alien at least 30 days prior to the date of the review. The notice will be provided either by personal service or certified mail/return receipt. The notice shall specify the factors to be considered and explain that the alien will be provided the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order.

(4) For the review discussed in paragraph 3 above, an interview is mandatory and the District Director's preliminary decision will be subject to Headquarters review. Thereafter, custody reviews will be conducted every six months, alternating between District Director file reviews and a review that includes the opportunity for an interview at the alien's request and a Headquarters review of detention decisions. A separate notice will advise the alien of the opportunity for the interview. The alien may check the appropriate box on the notice, returning the form provided within 14 calendar days so that an interview may be scheduled. The District Director has the discretion to schedule further interviews if he determines they would assist him in reaching a custody determination.

(5) The alien must be advised that he may submit any information relevant to support his request for release from detention, either in writing, electronically, by U.S. mail (or any combination thereof), or in person if an interview is conducted. The alien must also be advised that he may be represented by an attorney, or other person at no expense to the government. If an interview has been scheduled, the alien's representative may attend the review at the scheduled time.

(6) The District Director may delegate custody decisions to the level of the Assistant District Director, Deputy Assistant District Director, or those acting in their capacity. Custody determinations will be made by weighing favorable and adverse factors to determine whether the detainee has demonstrated by clear and convincing evidence that he does not pose a threat to the community, and is likely to comply with the removal order. See 8 C.F.R. § 241.4. The alien's past failure to cooperate in obtaining a travel document shall be considered an adverse factor in determining eligibility for release. See INA § 241(a)(1)(C) Suspension of Period. The fact that the alien has a criminal history does not create a presumption in favor of continued detention.

(7) Within thirty days of the District Director's custody review, the alien must receive written notification of a custody decision. All notification will be provided either by personal service or certified mail/return receipt. A decision to release should specify the conditions of release. A decision to detain will clearly delineate the factors presented by the alien in support of his release, and the reasons for the District Director's decision.

MEMORANDUM FOR REGIONAL DIRECTORS
DISTRICT DIRECTORS
OFFICERS IN CHARGE

SUBJECT: Interim Changes and Instructions for Conduct of Post-order Custody Reviews

(8) With respect to those detain decisions that are subject to Headquarters review under paragraph 4, the District Director's determination that the alien should be detained is to be regarded as only preliminary. In those instances, the Regional Directors will forward the preliminary detain decisions to Headquarters for review. Headquarters review will be conducted by Operations and Programs representatives (with assistance from the Office of General Counsel as necessary). Where the Headquarters reviewer's decision concurs with the District Director's, the Headquarters reviewer will write a supporting statement and will seek concurrence from a second Headquarters reviewer. Where the two reviewers differ, a panel of three Headquarters reviewers will conduct a further review of the case. The Headquarters panel may ratify the District Director's decision, return the case to the District Director to reconsider his decision, or determine that additional information is required to make a decision. The Headquarters review must be completed within thirty days of file receipt. The Headquarters review conclusions will be forwarded to the Regional Director for distribution to and appropriate action by the District Director.

(9) The District Director will review his decision in light of the Headquarters recommendations and will notify the alien of the final custody determination within thirty days of completion of the Headquarters review.

(10) The District Director should make every effort to effect the alien's removal both before and after expiration of the removal period. All steps to secure travel documents must be fully documented in the alien's file. However, if the District Director is unable to secure travel documents locally after making diligent efforts to do so, then the case shall be referred to Headquarters OPS/DDP for assistance. More detailed instructions will be issued from the Executive Associate Commissioner for Operations by separate memorandum.

(11) On August 30, 1999, and on the last workday of each quarter (September, December, March, June) each district shall submit a custody review status report to its Regional office and to Headquarters. There will be more detailed instructions issued on reporting procedures at a later time.

FORMS [to be distributed]

(a) Notice to Alien
(b) Notice of Interview
(c) Detained Alien Custody Review Worksheet
(d) Decision of Custody Review
(e) Decision to Continue Detention
(f) Decision to Release
(g) Custody Review Status Report

ORIGINAL

Supreme Court, U.S.
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NO. 99-7791

IN THE

SUPREME COURT OF THE UNITED STATES

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN and
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPREME COURT, U.S.

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May, 2000

NO. 99-7791

IN THE

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KESTUTIS ZADVYDAS,

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QUESTIONS PRESENTED FOR REVIEW

The general question presented by this case is whether the Constitution prohibits the prolonged indefinite detention of an immigrant after entry of a final order of deportation when deportation cannot be effectuated. The three subsidiary constitutional questions are:

I.

Whether the circuit court erred in ruling that "resident aliens," like "excludable aliens," can be indefinitely detained.

II.

Whether the circuit court improperly invoked the "plenary power doctrine" absent a question of national sovereignty or foreign relations.

III.

Whether the circuit court failed to recognize the fundamental nature of petitioner's liberty interest to be free from physical restraint.

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Now comes petitioner Kestutis Zadvydas, through undersigned counsel, and pursuant to Supreme Court Rule 15.6, hereby files the following Reply Brief in support of his Petition for Writ of Certiorari, which was filed on January 11, 2000. Petitioner respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals filed August 11, 1999, as to which rehearing was denied on October 13, 1999.

ARGUMENT

In its Brief in Opposition, the government contends there is no conflict between the Ninth Circuit's decision in **Ma v. Reno**, 208 F.2d 815 (9th Cir. 2000) and the instant matter and, therefore, no reason to grant certiorari to resolve the two apparently disparate opinions.[1] Respondent acknowledges that the case decided by the Ninth Circuit is similar. However, because the Ninth Circuit granted habeas relief based on statutory grounds and the Fifth Circuit decided this case on constitutional grounds, the government concludes there is no conflict between the two circuits. The government also asserts that since the statutory argument was not addressed by the Fifth Circuit and was not included in the original petition or supplemental petition, that this case would be an inappropriate "vehicle" to consider the argument accepted in **Ma**.

Contrary to respondent's contention, this statutory question is properly before the Court. First, this same argument was raised and litigated in the Court of Appeals. At oral argument, the Fifth Circuit Court of Appeals requested the parties file supplemental briefs. Zadvydas accordingly filed a supplemental brief arguing that the new statute, Title 8, United States Code, 1231(a)(6), (INA 241(a)), lacked the mandatory detention language contained in the prior statutes.

[1]See Brief in Opposition, pp.15-19.

Zadvydas further contended (as ultimately was held in **Ma**) that "federal courts consistently read a 'reasonable time' limitation into the government's authority to detain a deportable alien..." and urged the Court of Appeals to do so in this case.[2] Petitioner also pointed out in his Supplemental Brief filed at the Fifth Circuit Court of Appeals that finding a "reasonable time" limitation to be part of the statute avoids the danger of needlessly resolving constitutional issues.[3] See **Ohio v. Akron Center for Reproductive Health**, 497 U.S. 502, 514 (1990).

This Court has held that review before it brings not just the constitutional questions decided below, but the entire case. See, e.g., **Zobrest v. Catalina Foothills School District**, 509 U.S. 1, 7 (1993) (litigants failed to urge any statutory grounds before the Court of Appeals), quoting, **United States v. Locke**, 471 U.S. 84, 92 (1985). Where non-constitutional issues are raised before the Court of Appeals, those issues can be considered by this Court even though not specifically noted in the petition for certiorari. Federal courts should avoid constitutional questions if another ground is available upon which to decide a case. **Zobrest** 509 U.S. at 7-8. Moreover,

[2]Petitioner-Appellee's Fifth Circuit Supplemental Brief, p.10-17 (See attached). A copy of petitioner-appellee's entire Fifth Circuit Supplemental Brief has been lodged with the Clerk of the United States Supreme Court.

[3]Petitioner-Appellee's Fifth Circuit Supplemental Brief, p.10-17 (see attached).

courts should first consider non-constitutional issues before reaching constitutional questions. See, e.g., **Spector Motor Service, Inc. v. McLaughlin**, 323 U.S. 101, 105 (1944). Because of this avoidance doctrine, the statutory issue here is a necessary predicate to the resolution of the questions presented in the petition. As such, the statutory question resolved in **Ma** is fairly included in the claims set out in Mr. Zadvydas' original petition. See **Caspari v. Bohlen**, 510 U.S. 383, 389-90 (1994). As a result, this Court can and should address the statutory question.

To briefly elaborate on the statutory issue, petitioner was released into the custody of the Immigration and Naturalization Services (INS) in 1994. As noted by the Fifth Circuit, "a flurry of statutory changes have taken place" since then. **Zadvydas v. Underdown**, 185 F.3d 279, 286 (5th Cir. 1999). During that time, detention was governed by Title 8, United States Code, Section 1252 and the Transition Period Custody Rules (TPCR) authorized by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). These two statutes place the burden to prove that he is not a danger to the community or a flight risk before being released on the detainee awaiting deportation. The most recent provision of IIRIRA authorizes detention, but makes it discretionary after ninety days. IIRIRA, Section 305(c), codified as Title 8, United States Code, Section 1231(a)(6), Immigration and Nationalization Act (INA), Section

241(a)(6). Because of this change, INA §241(a) actually provides less authority for petitioner's continued indefinite detention than the prior statutory regime at issue before the district court.

More specifically, under the new statute the Attorney General is required to expel an alien ordered removed within a ninety (90) day "removal period." INA §241(a)(1). During the removal period, the Attorney General "[u]nder no circumstances" shall release an alien who is removable on the basis of prior criminal convictions or terrorist activity. INA §241(a)(2). Following the removal period, detention is governed by two provisions. INA §241(a)(6) provides that "[a]n alien ordered removed [on criminal grounds] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period..." (emphasis added). Another provision, INA §241(a)(3), requires INS supervision of any person released after the removal period.

Notably, neither section authorizes indefinite detention of an alien who the government is unable to remove. As previously noted, if the statute were read to authorize such detention, it would raise serious constitutional questions.

This result is also in accord with the statutory history. Section 241(a) differs from the prior detention scheme in two critical respects. First, when amending the INA, Congress shortened the time

period in which the INS is required to effectuate an order of removal, from the six months formerly provided to 90 days. Compare INA §242(a)(2)(C) ("the Attorney General shall have a period of six months from the date of such order") with INA §241(a)(1) ("the Attorney General shall remove the alien from the United States within a period of 90 days"). Moreover, INA §241(a) lacks the mandatory detention language in prior statutes. Both INA §242(a)(2) and the Temporary Period Custody Rules (TPCR) prohibited the INS from releasing criminal aliens who were unable to demonstrate that they posed neither a danger or flight risk. See INA §242(a)(2)(B)(1995) ("The Attorney General may not release an alien from custody....either before or after a finding of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that [he] is not a threat to the community and that [he] is likely to appear before any scheduled hearings."); IIRIRA §303(b)(3)(B) ("The Attorney General may release the alien only if the alien . . . satisfies the Attorney General that the alien will not pose a danger to the safety of persons or of property and is likely to appear for any scheduled proceeding."). In contrast, INA §241(a)(6), as amended by IIRIRA, merely authorizes continued detention for an unspecified period of time beyond the 90-day removal period.

The "absence of a time limit on detention" following entry of a deportation order has never been viewed as authorizing the INS to detain a deportable alien indefinitely. Prior to 1950, the immigration

statute did not contain any specific time limit for detention pending deportation. Immigration Act of 1917, §§20, 21, 39 Stat. 890-891 (1917) (requiring that deportable aliens be "taken into custody and deported, subject to release on bond pending disposal of the case"). Nonetheless, the federal courts consistently read a "reasonable time" limitation into the government's authority to detain a deportable alien pursuant to this statute, generally interpreted to be no longer than four months. See **Wolck v. Weedin**, 58 F.2d 928, 931 (9th Cir. 1932); **Saksagansky v. Weedin**, 53 F.2d 13, 16 (9th Cir. 1931); **Caranica v. Nagel**, 28 F.2d 955, 957 (9th Cir. 1928); **Petition of Brooks**, 5 F.2d 238 (D. Mass. 1925); **United States ex rel. Ross v. Wallis**, 279 F. 401, 404 (2d Cir. 1922).

In 1950, Congress enacted a statute which placed a six-month limit on detention following a deportation order. Congress viewed this amendment as a grant of new power. See H.R. Rep. No 1192, 81st Cong., 1st Sess. 6 (1949) ("Existing law does not grant the Attorney General any specified period of time within which he may hold deportable aliens in custody or under control while he negotiates for their return abroad."). Such a view of this provision makes sense in light of the fact that it gave the Attorney General more time to effectuate the deportation than had previously been authorized under the cases cited above. Nonetheless, this detention provision still permitted only six months of detention following a final order of deportation. Following

the end of the six-month period, "the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section" Title 8, United States Code, Section 1252(c) (repealed 1996) (emphasis added). Section 1252, however, did not authorize any further detention beyond the reasonable deportation period. Thus, courts held that "the six month limit on detention . . . was absolute and any detention beyond that time was unlawful." **Oquachuba v. INS**, 706 F.2d 93, 96 (2d Cir. 1983) (summarizing district court ruling); see **Johns v. Dep't of Justice**, 653 F.2d 884, 890 (5th Cir. 1981) (finding that after the six month period expires "detention is not permitted"); **Castillo-Gradis v. Turnage**, 752 F. Supp. 937, 941 (S.D. Cal. 1990) ("Once the six months has expired, the alien must be released and put under supervision until the INS is ready to execute his deportation."). This six-month limit on post-deportation order of detention remained in effect until 1990, when Congress amended the provision to bar release of aggravated felons with final orders of deportation. Immigration Act of 1990, Section 504, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).[4] The Antiterrorism and Effective Death

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[3]Specifically, this amendment stated that "[n]otwithstanding . . . subsections (c) [the six-month rule]" the Attorney General could not release a lawfully admitted alien who had been convicted of an aggravated felony unless the alien could demonstrate a lack of danger and flight risk. INA §242(a)(2)(A) & (B), Title 8, United States Code, Sections 1252(a)(2)(A) & (B) (repealed 1996). The following year, Congress further amended INA §242(a)(2)(B) to

Penalty Act of 1996 made minor changes to the wording of old INA §242(a)(2)(A). More significantly, it repealed INA §242(a)(2)(B), which had permitted the Attorney General to release an aggravated felon from detention upon a showing that the alien was not a danger or flight risk. Section 440(c), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). For a short period of time the INS actually had no discretion to release any aggravated felon from detention.

Congress later amended the detention provisions of the INA by passing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Pub. L. No. 104-208, Div. C, 110 Stat. 309-546 (IIRIRA). This law repealed the detention provisions of INA §242(a) and created new detention provisions concerning aliens with final orders of removal at INA §241(a), Title 8, United States Code, Section 1231(a), described above. Lacking explicit statutory authority for indefinite detention of deportable aliens, the government can only argue that the INA implicitly permits indefinite detention. However, when the intent of Congress cannot be clearly discerned and there are several possible explanations for its inaction, that inaction is not a sufficient basis from which to imply statutory authority. **United States v. Price**, 361

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make more explicit that the limitation upon release from detention applied to aggravated felons "either before or after a determination of deportability." Section 306(a)(4), Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (Dec. 12, 1991).

U.S. 304, 310-11 (1960) ("[N]onaction by Congress affords the most dubious foundation for drawing positive inferences."). Nor can the courts supply interpretations that enforce policy choices not made by Congress, particularly when such choices would compromise such basic rights as personal liberty. **Carter v. Derwinski**, 987 F.2d 611, 615 (9th Cir. 1993) (en banc) (We may insist on a clear statement of congressional intent before interpreting a statute in a way that compromises especially weighty values.").

CONCLUSION

For the reasons set forth above, and the reasons set forth in petitioner Zadvydas' original Petition for Writ of Certiorari, and Supplemental Brief in Support of Petition, this Court should grant certiorari and reverse the judgment of the Fifth Circuit.

Respectfully submitted this 24th day of May, 2000.

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CERTIFICATE

I hereby certify that a copy of the foregoing notice to continue stay of mandate has been served on the following counsel, at the following addresses, by placing same in the United States mail, postage prepaid, this 24th day of May, 2000.

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A P P E N D I X

1. Pages 10-17 of the *Supplemental Brief for the Petitioner-Appellee Kestutis Zadvydas* filed with the Fifth Circuit Court of Appeals

alien's removal, detention is governed by two provisions. INA §241(a)(6) provides that "[a]n alien ordered removed [on criminal grounds] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period..." (emphasis added). Another provision, INA §241(a)(3), requires INS supervision of any person released after the Removal Period, including requirements that the alien periodically appear before an immigration officer, submit to necessary medical and psychiatric exams, give certain information under oath, and obey reasonable restrictions on conduct or activities.

Notably, neither of these sections authorizes indefinite detention of an alien who the government is unable to remove. Indeed, if the statute were read to authorize such detention, it would raise serious constitutional questions.[4] Rather than reaching the substantial constitutional issues in this case, the Court should find that Mr. Zadvydas' detention violates the INA because the Act does not authorize indefinite detention. See Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 514

[4]As set forth in prior briefing by both petitioner and amici, indefinite detention of a deportable alien whose removal cannot be effectuated violates due process. See Pet.'s Br. at 17-39; Brief of Amicus Curiae ACLU and Texas Lawyers Committee at 4-14.

(1990) (wherever possible, courts should construe statutes in a manner that avoids the danger of unconstitutionality).

This result is also in accord with the statutory history. Section 241(a) differs from the prior detention scheme in two critical respects. First, when amending the INA, Congress shortened the time period in which INS is required to effectuate an order of removal, from the six months formerly provided to 90 days. Compare INA §242(a)(2)(C) ("the Attorney General shall have a period of six months from the date of such order") with INA §241(a)(1) ("the Attorney General shall remove the alien from the United States within a period of 90 days"). Even more significantly, INA §241(a) lacks the mandatory detention language in prior statutes -- both INA §242(a)(2) and the TPCR -- which prohibited the INS from releasing criminal aliens who were unable to demonstrate that they posed neither a danger or flight risk. See INA §242(a)(2)(B)(1995) ("The Attorney General may not release from custody....either before or after a finding of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings."); IIRIRA §303(b)(3)(B) ("The Attorney General may release the alien only if the alien . . . satisfies the Attorney General that the

alien will not pose a danger to the safety of persons or of property and is likely to appear for any scheduled proceeding."). In contrast, INA §241(a)(6), as amended by IIRIRA, merely authorizes continued detention for an unspecified period of time beyond the 90-day removal period.

Indeed, in finding that the prior statutory scheme authorized petitioner's indefinite detention, the district court expressly relied upon both the "mandatory language" of §242(a)(2) and "the absence of a time limit on detention." Zadvydas v. Caplinger, 986 F. Supp. 1011, 1025 (E.D. La. 1997); see also Barrera-Echavarria v. Rison, 44 F.3d 1441, 1446 (9th Cir. 1995) (holding that the INA expressly authorized indefinite detention of excludable aliens because the statute required detention of excludable aliens); Gisbert v. Attorney General, 988 F.2d 1437, 1445-46 (5th Cir. 1993) (noting that statute limits authority to release); Alvarez-Mendez v. Stock, 941 F.2d 956, 960-61 (9th Cir. 1991). With such mandatory language now repealed, the Attorney General's statutory authority to indefinitely detain immigrants has been undermined.

Moreover, the "absence of a time limit on detention" following entry of a deportation order has never been viewed as

authorizing the INS to detain a deportable alien indefinitely.[5] Indeed, prior to 1950, the immigration statute did not contain any specific time limit for detention pending deportation. Immigration

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[5]This Court's decision in **Gisbert** does not compel a different result. **Gisbert** involved both a different statute and aliens who had never been admitted to the country. Petitioners, a group of Mariel Cubans, argued that their detention violated the INA because at that time no statutory provision expressly authorized the detention of excludable aliens after a final order had issued, although the INA did expressly provide for such detention of deportable immigrants. This Court rejected that argument, finding implicit authority to detain because the statute was written as a limit on the Attorney General's authority to release aliens, rather than as a limitation on the power to detain excludable individuals. **Gisbert**, 988 F.2d at 1446. As for the duration of such custody, the Court compared the provision concerning excludables, which lacked any time limit, with that governing deportables, which limited custody to six months after a final order was issued. This Court determined that difference to be significant because it indicated that "Congress intended to authorize more stringent restrictions on the freedom of excluded aliens than those imposed on resident aliens." **Id**. at 1446 n.17. Clearly, a different conclusion must be drawn when a detention statute governing deportable aliens is silent as to the duration of such detention, because courts traditionally have imposed a reasonable duration requirement upon the post-final order detention of admitted aliens. **See** pages 14-15, **infra**.

Finally, the **Gisbert** court was concerned "that to allow the Attorney General to detain deportable aliens, without providing the same authority regarding excludable aliens . . . 'would be contrary to accepted tenets of U.S. immigration law, which treat aliens subject to deportation more favorably than those seeking initial admission.'" **Id**. at 1445 (quoting **Alvarez-Mendez v. Stock**, 941 F.2d 956, 961-62 (9th Cir. 1991)). This concern was understandable, given that "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after any entry." **Leng May Ma v. Barber**, 357 U.S. 185, 187 (1958).

Act of 1917, §§20, 21, 39 Stat. 890-891 (1917) (requiring that deportable aliens be "taken into custody and deported, subject to release on bond pending disposal of the case"). Nonetheless, the federal courts consistently read a "reasonable time" limitation into the government's authority to detain a deportable alien pursuant to this statute, generally interpreted to be no longer than four months. **See** **Wolck v. Weedin**, 58 F.2d 928, 931 (9th Cir. 1932); **Saksagansky v. Weedin**, 53 F.2d 13, 16 (9th Cir. 1931); **Caranica v. Nagel**, 28 F.2d 955, 957 (9th Cir. 1928); **Petition of Brooks**, 5 F.2d 238 (D. Mass. 1925); **United States ex rel. Ross v. Wallis**, 279 F. 401, 404 (2d Cir. 1922).

It wasn't until 1950 that Congress enacted a statute which placed a six-month limit on detention following a deportation order. Congress viewed this amendment as a grant of new power. **See** H.R. Rep. No 1192, 81st Cong., 1st Sess. 6 (1949) ("Existing law does not grant the Attorney General any specified period of time within which he may hold deportable aliens in custody or under control while he negotiates for their return abroad."). Such a view of this provision makes sense in light of the fact that it gave the Attorney General **more** time to effectuate the deportation

than had previously been authorized under the cases cited above.[6] This six-month limit on post-deportation order detention remained in effect until 1990, when Congress amended the provision to bar release of aggravated felons with final orders of deportation. Section 504, Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).[7] The Antiterrorism and Effective Death

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[6] Nonetheless, this detention provision still permitted only six months of detention following a final order of deportation. Following the end of the six-month period, "the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section," 8 U.S.C. §1252(c) (repealed 1996) (emphasis added). Section 1252, however, did not authorize any further detention beyond the reasonable deportation period. Thus, even if an alien created a "laundry list of . . . misdeeds," courts held that "the six month limit on detention . . . was absolute and any detention beyond that time was unlawful." Oguachuba v. INS, 706 F.2d 93, 96 (2d Cir. 1983) (summarizing district court ruling); see Johns v. Dep't of Justice, 653 F.2d 884, 890 (5th Cir. 1981) (finding that after the six month period expires "detention is not permitted"); Castillo-Gradis v. Turnage, 752 F. Supp. 937, 941 (S.D. Cal. 1990) ("Once the six months has expired, the alien must be released and put under supervision until the INS is ready to execute his deportation.").

[7] Specifically, this amendment stated that "[n]otwithstanding . . . subsections (c) [the six-month rule]" the Attorney General could not release a lawfully admitted alien who had been convicted of an aggravated felony unless the alien could demonstrate a lack of danger and flight risk. INA §242(a)(2)(A) & (B), 8 U.S.C. §1252(a)(2)(A) & (B) (repealed 1996). The following year, Congress further amended §242(a)(2)(B) to make more explicit that the limitation upon release from detention applied to aggravated felons "either before or after a determination of deportability." Section 306(a)(4), Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (Dec. 12, 1991).

Penalty Act of 1996 made minor changes to the wording of old INA §242(a)(2)(A). More significantly, it repealed INA §242(a)(2)(B), which had permitted the Attorney General to release an aggravated felon from detention upon a showing that the alien was not a danger or flight risk. Section 440(c), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). Thus, for a short period of time, the INS actually had no discretion to release any aggravated felon from detention, either before or after a final order.

Soon thereafter, Congress significantly amended the detention provisions of the INA by passing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Pub. L. No. 104-208, Div. C, 110 Stat. 309-546 (IIRIRA). This law repealed the detention provisions of INA §242(a) and created new detention provisions concerning aliens with final orders of removal at INA §241(a), 8 U.S.C. §1231(a), described above. As already noted, INA §241 differs in two significant respects from the prior detention statute -- shortening the removal period from six months to 90 days, and eliminating the language that mandated detention of criminal aliens whose release could not be effectuated within this time. These changes indicate that Congress intended to move away

from prolonged indefinite detention of immigrants after removal proceedings.[8]

III.

INS Has Authority To Review Petitioner's Custody Status Even Though He Is Not Currently Detained.

The government concedes that INS has discretion pursuant to §241(a)(6) and the agency's implementing regulations to review the custody status of aliens with final orders of deportation and to order their release under conditions if they are neither a danger or flight risk. Gov't Supp. Br. at 10-14 (citing 8 C.F.R. §§241.4, 236.1(d)(2)(ii), and 236.1(d)(3)(iii)). Nonetheless, the

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[8] Faced with this lack of explicit statutory authority for indefinite detention of deportable aliens, the government can only argue that the INA implicitly permits Mr. Zadvydas' indefinite detention. However, to read the relevant statutory provisions in this way would violate the principle of statutory construction that mandates that when the intent of Congress cannot be clearly discerned and there are several possible explanations for its inaction, that inaction is not a sufficient basis from which to imply statutory authority. United States v. Price, 361 U.S. 304, 310-11 (1960) ("[N]onaction by Congress affords the most dubious foundation for drawing positive inferences."). Nor can the courts supply interpretations that enforce policy choices not made by Congress, particularly when such choices would compromise such basic rights as personal liberty. Carter v. Derwinski, 987 F.2d 611, 615 (9th Cir. 1993) (en banc) ("We are not free to pick and choose among statutory or administrative provisions in order to achieve a result we deem fair or sensible. . . . We may insist on a clear statement of congressional intent before interpreting a statute in a way that compromises especially weighty values.").

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NO. 99-7791

IN THE

SUPREME COURT OF THE UNITED STATES

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN and
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The general question presented by this case is whether the Constitution prohibits the prolonged indefinite detention of an immigrant after entry of a final order of deportation when deportation cannot be effectuated. The three subsidiary constitutional questions are:

I.

Whether the circuit court erred in ruling that "resident aliens," like "excludable aliens," can be indefinitely detained.

II.

Whether the circuit court improperly invoked the "plenary power doctrine" absent a question of national sovereignty or foreign relations.

III.

Whether the circuit court failed to recognize the fundamental nature of petitioner's liberty interest to be free from physical restraint.

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SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

Now comes petitioner Kestutis Zadvydas, through undersigned counsel, and pursuant to Supreme Court Rule 15.8, hereby files the following Supplemental Brief in support of his Petition for Writ of Certiorari, which was filed on January 11, 2000. Petitioner respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals filed August 11, 1999, as to which rehearing was denied on October 13, 1999.

OPINION BELOW

The opinion below is reported at **Zadvydas v. Underdown**, 185 F.3d 279 (5th Cir. 1999). The opinion of the Fifth Circuit is attached as Appendix B to the original Petition for Writ of Certiorari. The order of the Fifth Circuit of October 13, 1999, denying rehearing is attached as Appendix C to the original Petition for Writ of Certiorari.

JURISDICTION

The judgment and opinion of the Court of Appeals was filed on August 11, 1999. Rehearing was denied on October 13, 1999. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

The District Court had jurisdiction of this matter pursuant to Title 28, United States Code, Section 2241. The Court of Appeals exercised jurisdiction over this appeal pursuant to Title 28, United States Code, Section 1291.

SUPPLEMENTAL ARGUMENT IN SUPPORT OF GRANTING WRIT OF CERTIORARI

Since the submission of the original Petition for Writ of Certiorari, counsel has become aware of a recently decided case from the United States Court of Appeals for the Ninth Circuit, which directly supports Petitioner's position on Subsidiary Questions 1 and 3 of the Questions Presented in his original Petition. The Ninth Circuit declined to follow the Fifth Circuit by applying the doctrine of constitutional avoidance. This creates a conflict in the Circuits. The Ninth Circuit similarly declined to follow the Tenth Circuit. See **Ma v. Reno**, ___ F.3d ___, 2000 WL 358445 (9th Cir. (Wash.)); **Ho v. Greene**, 204 F.3d 1045, 2000 WL 228755 (10th Cir. Feb. 29, 2000).

In **Ma**, the United States Court of Appeals for the Ninth Circuit clearly ruled in favor of resident aliens for many of the reasons set forth in petitioner's original writ application.

The court in **Ma** held that:

> Under the statute, aliens who cannot be removed at the end of ninety days fall into two groups.
>
> . . .
>
> Those in the second group "may be detained beyond the removal period" and, if released, shall be subject to the same supervisory

> provisions applicable to aliens in the first group. 8 U.S.C. § 1231(a)(6). [FN12] Aliens in the second group include, among others, persons removable because of criminal convictions (such as drug offenses, certain crimes of moral turpitude, "aggravated felonies," firearms offenses, and various other crimes). 8 U.S.C. § 1227(a)(2). Ma's criminal conviction places him in the second group.
>
> . . .
>
> We hold that Congress did not grant the INS authority to detain indefinitely aliens who, like Ma, have entered the United States and cannot be removed to their native land pursuant to a repatriation agreement. To the contrary, we construe the statute as providing the INS with authority to detain aliens only for a reasonable time beyond the [90 day] statutory removal period.

Ma, 2000 WL 358445 pp.4,6,7. (Citation omitted).

In clear contrast to **Ma**, the **Ho** court held that the statute unambiguously "expressly allows for continued detention [of resident aliens] beyond the removal period **with no time limit** placed on the duration of such detention." **Ho**, at 1057 (emphasis supplied).

The **Ma** court stated that its views were in accord with a long line of cases involving resident aliens who could not be deported for various reasons, such as the lack of a repatriation agreement, because they were stateless, or for any other reason.

Ma, at p.7. Mr. Zadvydas is stateless and is a resident alien. The Ninth Circuit noted that an earlier immigration statute set no time limits as to the length of detention. That statute was construed to mean that "detention could only continue for a reasonable period." **Ma**. (citing, **Caronica v. Nagle**, 28 F.2d 955 (9th Cir. 1928); **Saksagansky v. Weedin**, 53 F.2d 13, 16 (9th Cir. 1931); **Wolck v. Weedin**, 58 F.2d 928, 930-31 (9th Cir. 1932); **Ross v. Wallis**, 279 F. 401, 403 (2d Cir. 1922)).

In light of **Ma**, **Ho** and the instant matter, a conflict exists in the Circuits as to the constitutional status of resident aliens in relation to excludable aliens.

Unlike the Ninth Circuit, the Fifth and Tenth Circuits ruled that resident aliens were indistinguishable from excludable aliens with respect to indefinite detention. **Ma**, 2000 WL 35445 p.5. Whereas the Ninth Circuit cited numerous decisions of this Court stating that "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission. . . and those who are within the United States after an entry, irrespective of its legality," the other two circuits rejected such a distinction. **Ma**, p.6, quoting **Leng May Ma v. Barber**, 357 U.S. 185 (1958). Instead, the Tenth and Fifth Circuits adopted, verbatim, the INS' novel theory that this Court's

decision in **Shaughnessy v. U.S. ex rel Mezei**, 345 U.S. 206 (1953), applies to resident aliens "because, for constitutional purposes an [resident] alien ordered removed has no further right to be here and therefore stands on essentially the same footing as an excludable alien." **Ma**, at p.6. Clearly, it is the Tenth and Fifth Circuits reliance on **Mezei**, a case dealing solely with an excludable alien, that conflicts with the holding in **Ma**. As the Ninth Circuit recognized, this novel legal theory runs counter to this Court's recognition of a distinction between the two classes of aliens. **Ma**, at pp.5-6. See **Landon v. Plasencia**, 459 U.S. 21, 32 (1982); **Plyler v. Doe**, 457 U.S. 202 (1982); **Matthews v. Diaz**, 426 U.S. 67 (1976); **Leng May Ma v. Barber**, 357 U.S. 185 (1958); **Wong Wing v. United States**, 163 U.S. 228 (1986).

Without resolution of the conflict among the circuits, aliens located in the Fifth and Tenth Circuits will be subjected to indefinite detention awaiting deportation that may never occur. At the same time, resident aliens located in the Ninth Circuit must be released in a reasonable period of time. Constitutional issues should not turn on accidents of geography.

CONCLUSION

For the reasons set forth above, and the reasons set forth in petitioner Zadvydas' original Petition for Writ of Certiorari, this Court should grant certiorari and reverse the judgment of the Fifth Circuit.

Respectfully submitted this 14th day of April, 2000.

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CERTIFICATE

I hereby certify that a copy of the foregoing notice to continue stay of mandate has been served on the following counsel, at the following addresses, by placing same in the United States mail, postage prepaid, this 14th day of April, 2000.

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NO. 99-7791

IN THE

SUPREME COURT OF THE UNITED STATES

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN;
U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

A P P E N D I X

1. **Ma v. Reno**, ___ F.3d ___, 2000 WL 358445 (9th Cir. (Wash.))

2. **Ho v. Greene**, 204 F.3d 1045, 2000 WL 228755 (10th Cir. Feb.29, 2000)

Kim Ho MA, Petitioner-Appellee,
v.
Janet RENO, Attorney General; and Robert C. Smith, District Director of the Immigration and Naturalization Service, Seattle, Washington, Respondents-Appellants.

No. 99-35976.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 14, 2000

Filed April 10, 2000

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Frank Tse, San Franciso, CA, for amicus Southeast Asia Resource Action Center.

Appeal from the United States District Court for the Western District of Washington. Robert S. Lasnik, District Judge, Presiding

Before: Stephen Reinhardt, David R. Thompson, and T.G. Nelson, Circuit Judges.

REINHARDT, Circuit Judge:

*1 Petitioner Kim Ho Ma is an alien who left his native land, Cambodia, as a refugee at the age of two and has resided in the United States as a legal permanent resident since he was six. At the age of seventeen he was involved in a gang-related shooting, and was convicted of manslaughter. After completing his prison sentence some two years later, he was taken into INS custody and ordered removed because of that conviction. However, the INS has been unable to remove him, and hundreds of others like him, because Cambodia does not have a repatriation agreement with the United States and therefore will not permit Ma's return. [FN1] The question before us is whether, in light of the absence of such an agreement, the Attorney General has the legal authority to hold Ma, who is now twenty two, in detention indefinitely, perhaps for the remainder of his life.

Ma challenged his detention by filing a petition for habeas corpus, under 28 U.S.C. § 2241, in the District Court for the Western District of Washington. That court ruled that Ma's continued detention violates his substantive due process rights under the Fifth Amendment. [FN2] Respondents, the Immigration and Naturalization Service, Janet Reno (as Attorney General), and Robert Coleman (as INS Acting District Director in Seattle) (hereinafter collectively referred to as "INS") appeal the district court's decision releasing Ma from INS custody. We have jurisdiction [FN3] and affirm, but on a different basis.

We hold that the INS lacks authority under the immigration laws, and in particular under 8 U.S.C. § 1231(a)(6), to detain an alien who has entered the United States for more than a reasonable time beyond the normal ninety day statutory period authorized for removal. More specifically, in cases like Ma's, in which there is no reasonable likelihood that the alien will be removed in the reasonably foreseeable future, we hold that it may not detain the alien beyond that statutory removal period. Because we construe the statute as not permitting the indefinite detention of aliens like Ma, we need not decide the substantial constitutional questions raised by the INS's indefinite detention policy.

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I.

*2 Petitioner Kim Ho Ma's family fled Cambodia in 1979 and took Ma, who was then two years old, with them. After spending over five years in refugee camps, Ma's family lawfully entered the United States in 1985 as refugees. Ma's status was adjusted to that of a lawful permanent resident in 1987. In 1996, he was convicted, by a jury, of first degree manslaughter following a gang-related shooting. He was sentenced to 38 months in prison, but eventually served only 26 after receiving credit for good behavior. He was tried as an adult, although he was only seventeen years of age at the time of the crime. Although the INS repeatedly refers to Ma's criminal record, this was his only criminal conviction.

Ma's conviction made him removable as an alien convicted of certain crimes under 8 U.S.C. § 1227(a)(2). Because he was released by the state authorities after April 1, 1997, the INS's authority to take him into custody was governed by the permanent custody rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (codified at 8 U.S.C. § 1231). The INS took Ma into custody following his release from prison and initiated removal proceedings against him. An immigration judge found Ma removable, and furthermore found him ineligible for asylum or withholding of deportation because of his conviction. Ma appealed this ruling to the Board of Immigration Appeals (BIA). The BIA affirmed the immigration judge's decision. Although Ma's order of removal became final on October 26, 1998, the INS could not remove him within the ninety day period during which it is authorized to do so because the United States had, and still has, no repatriation agreement with Cambodia. As a result, Ma remained in detention until he filed this petition for a writ of habeas corpus, which was granted by the district court on September 29, 1999. He is now twenty-two and has been in custody (and, but for the district court's decision, would have been incarcerated) for nearly five years, although his sentence accounts for only a little over two years of that period.

In addition to filing the habeas petition we now review, Ma made several other attempts to secure his release. During the pendency of the proceedings before the immigration judge and the BIA, Ma filed two motions to be released on bond--in October and December 1997. In both instances an immigration judge denied Ma's requests, finding, based solely on the offense he committed at the age of seventeen, that although he was not a flight risk, he was a danger to the community.

In May 1999, over six months after Ma's final removal order (and after his habeas petition was filed), the INS, by letter, requested travel documents for Ma from the Cambodian government. [FN4] The next day, the INS conducted the "ninety day" custody review, as provided for in its regulations, to determine if Ma should be released on bond. [FN5] An INS officer prepared a report after interviewing Ma and reviewing letters and other materials submitted by his family and friends. The officer's report stated that Ma's family was "very supportive," and that if Ma was released he would be able to assist his handicapped 71 year old father in everyday activities. The report also stated that Ma constantly communicates with his younger brother to assure that his brother "does not follow in his footsteps." In addition, the report noted that Ma's older brother runs his own business and would employ Ma if he were released from custody. A deputy district director then reviewed the INS officer's report and issued a decision denying Ma's release. The decision was sent to Ma by means of a form letter that stated that the deputy director made his decision after considering a set of factors set out in INS regulations; [FN6] however the letter neither stated reasons nor discussed which factors were relied upon in reaching the decision to deny Ma's release. The letter added that "there is no appeal from this decision." [FN7]

On September 30, 1999, pursuant to additional internal regulations, the INS again reviewed its decision to continue detaining Ma. [FN8] Once again, INS officials found that Ma should remain in detention, based on the seriousness of his conviction and also on the ground of his threatened participation in a hunger strike while in custody. The reviewers stated that they were unable to conclude that Ma would "remain non-violent" and abide by the terms of his release. These decisions were made despite abundant information in the administrative record about Ma's relationships with his parents and siblings, employment prospects, and plans to avoid gang relations and criminal behavior. Upon reviewing Ma's habeas petition, the district court ruled that Ma's detention was unconstitutional on "substantive due process" grounds and ordered

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him released pending the outcome of this appeal. This court and the Supreme Court denied the INS's requests for a stay of the district court's release order. [FN9] The INS now appeals the district court's decision granting Ma's habeas corpus petition.

II.

*3 Although the bulk of the parties' arguments, as well as the district court's ruling, address the constitutionality of the INS's detention policy, we must first determine whether Congress provided the INS with the authority to detain Ma indefinitely, as the Attorney General contends.

In general, after an alien is found removable, the Attorney General is required to remove that alien within ninety days after the removal order becomes administratively final. [FN10] Many aliens, however, cannot be removed within the ninety day period for various reasons. First, some individual cases may simply require more time for processing. Second, there are cases involving aliens who have been ordered removed to countries with whom the United States does not have a repatriation agreement, such as Cambodia, Laos, and Vietnam. Finally, there may be those aliens whose countries refuse to take them for other reasons, and yet others who may be effectively "stateless" because of their race and/or place of birth. [FN11] Ma falls in the second category.

Under the statute, aliens who cannot be removed at the end of ninety days fall into two groups. Those in the first group must be released subject to supervisory regulations that require them, among other things, to appear regularly before an immigration officer, provide information to that official, notify INS of any change in their employment or residence within 48 hours, submit to medical and psychiatric testing, and comply with substantial restrictions on their travel. 8 U.S.C. § 1231(a)(3). Those in the second group "may be detained beyond the removal period " and, if released, shall be subject to the same supervisory provisions applicable to aliens in the first group. 8 U.S.C. § 1231(a)(6). [FN12] Aliens in the second group include, among others, persons removable because of criminal convictions (such as drug offenses, certain crimes of moral turpitude, "aggravated felonies," firearms offenses, and various other crimes). 8 U.S.C. § 1227(a)(2). Ma's criminal conviction places him in the second group.

INS argues that its authority to "detain beyond the removal period" gives it the authority to detain indefinitely aliens who fall in the second group and who cannot be removed in the reasonably foreseeable future. [FN13] Ma argues the opposite--that the INS's authority to detain aliens beyond the removal period does not extend to cases in which removal is not likely in the reasonably foreseeable future. On its face, the statute's text compels neither interpretation: while § 1231(a)(6) allows for the detention of group two aliens "beyond" ninety days, it is silent about how long beyond the ninety day period such detention is authorized. Thus, any construction of the statute must read in some provision concerning the length of time beyond the removal period detention may continue, whether it be "indefinitely," "for a reasonable time," or some other temporal measure.

*4 We hold that Congress did not grant the INS authority to detain indefinitely aliens who, like Ma, have entered the United States and cannot be removed to their native land pursuant to a repatriation agreement. To the contrary, we construe the statute as providing the INS with authority to detain aliens only for a reasonable time beyond the statutory removal period. In cases in which an alien has already entered the United States and there is no reasonable likelihood that a foreign government will accept the alien's return in the reasonably foreseeable future, we conclude that the statute does not permit the Attorney General to hold the alien beyond the statutory removal period. Rather, the alien must be released subject to the supervisory authority provided in the statute.

We adopt our construction of the statute for several reasons. First, and most important, the result we reach allows us to avoid deciding whether or not INS's indefinite detention policy violates the due process guarantees of the Fifth Amendment. Second, our reading is the most reasonable one--it better comports with the language of the statute and permits us to avoid assuming that Congress intended a result as harsh as indefinite detention in the absence of any clear statement to that effect. Third, reading an implicit "reasonable time" limitation into the statute is consistent with our case law interpreting a similar provision in a prior

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immigration statute. Finally, the interpretation we adopt is more consonant with international law. [FN14]

III.

The Supreme Court has long held that courts should interpret statutes in a manner that avoids deciding substantial constitutional questions. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988); United States v. Jin Fuey Moy, 241 U.S. 394, 401, 36 S.Ct. 658, 60 L.Ed. 1061 (1916); see also United States v. Bulacan, 156 F.3d 963, 974 (9th Cir.1998). We have referred to this rule as a "paramount principle of judicial restraint." United States v. Restrepo, 946 F.2d 654, 673 (9th Cir.1991).

In the immigration context, courts have often read limitations into statutes that appeared to confer broad power on immigration officials in order to avoid constitutional problems. For example, in United States v. Witkovich, 353 U.S. 194, 199, 77 S.Ct. 779, 1 L.Ed.2d 765 (1957), the Court read a limitation into a statute authorizing the INS to ask questions and receive information from deportable aliens within the United States. Because constitutional problems would have arisen if the statute were read as penalizing aliens who refused to answer questions that were irrelevant to any legitimate governmental purpose, the Court chose to read a limitation into the statute. Witkovich, 353 U.S. at 199.

*5 We followed Witkovich in Romero v. INS, 39 F.3d 977 (9th Cir.1994), which involved an alien who had lied to an INS official, thereby rendering her deportable because she violated a condition of her immigration status. The condition required that she answer truthfully all questions put to her by INS officials. However, the questions she did not answer truthfully were irrelevant to her visa status. Although the provision at issue stated that aliens who failed to comply with the conditions of their status were deportable, without defining those conditions in any way, we read into the statute a limitation on the kinds of conditions that the Attorney General could place on aliens. Id. at 979-80. Invoking the canon of constitutional avoidance, we concluded that the alien could not be required to answer questions having nothing to do with her visa status. Id. at 981; cf. Jean v. Nelson, 472 U.S. 846, 854-56, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985) (holding that immigration parole regulation does not permit race discrimination in order to avoid reaching constitutional question); Tashima v. Administrative Office of the U.S. Courts, 967 F.2d 1264, 1271 (9th Cir.1992) (interpreting statute stating that Office "may" provide representation to judges as requiring interpretation based upon criteria not listed in the statute, in order to avoid constitutional problems).

Of course, as the Supreme Court has noted repeatedly when formulating the canon of constitutional avoidance, the rule applies when the constitutional issue at hand is a substantial one. [FN15] The INS contends that the answer to Ma's constitutional challenge is dictated by a straightforward application of our en banc decision in Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir.1995) (en banc), and the Supreme Court's decision in Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953). [FN16] If this were correct, we would not need to invoke the canon of constitutional avoidance. However, those cases deal with a significantly different problem from the one we avoid here. Both Mezei and Barrera- Echavarria involved excludable aliens rather than aliens who have already entered the United States. As a result, the constitutional analysis in both cases rests on a doctrine known as the "entry fiction," which authorizes the courts to treat an alien in exclusion proceedings as one standing on the threshold of entry, and therefore not entitled to the constitutional protections provided to those within the territorial jurisdiction of the United States. Both decisions were entirely explicit in their reasoning on this point. In Mezei, the Court relied on the entry fiction (that an excludable alien has not entered the United States) in holding that an excludable alien is not entitled to procedural due process:

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned....

*6 Neither respondent's harborage on Ellis Island

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nor his prior residence here transforms this into something other than an exclusion proceeding.

Id. at 212-13 (internal citations omitted). While the Court held that Mezei could be detained indefinitely on Ellis Island, because no country would take him back, it rested its holding on the fact that Mezei's exclusion did not violate the immigration statute, and that as an alien who had not yet entered the country he had no other rights. [FN17]

We followed Mezei in Barrera-Echavarria, which involved a Mariel Cuban who was detained while excluded from the U.S. [FN18] After describing the petitioner's argument and noting our disagreement, we began our analysis by relying on the historic distinction between excludable and resident aliens:

> The Supreme Court has consistently recognized that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission ... and those who are within the United States after an entry, irrespective of its legality. In the latter instance, the Court has recognized additional rights and privileges not extended to those in the former category.

Barrera-Echavarria, 44 F.3d at 1448 (quotations omitted, alteration in original). We also quoted a passage from Landon v. Plasencia, 459 U.S. 21, 32, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982), stating that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." Barrera- Echavarria, 44 F.3d at 1449. [FN19] Shortly after this quotation, we noted that

> Noncitizens who are outside United States territories enjoy very limited protections under the United States Constitution. [citing United States v. Verdugo-Urquidez and Johnson v. Eisentrager] Because excludable aliens are deemed under the entry doctrine not to be present on United States territory, a holding that they have no substantive right to be free from immigration detention reasonably follows.

Barrera-Echavarria, 44 F.3d at 1450.

Thus, it is not surprising that Barrera-Echavarria upheld as constitutional the long-term detention of aliens who had not entered the United States, legally or illegally (although they had been paroled into this country). As we stated in that case, it is "not settled" that excludable aliens have any constitutional rights at all, id. at 1449, so it is clear that they cannot prevail where the government refuses to admit them. [FN20] In contrast to Mezei and Barrera-Echavarria, numerous cases establish that once an alien has "entered" U.S. territory, legally or illegally, he or she has constitutional rights, including Fifth Amendment rights. See, e.g., Mathews v. Diaz, 426 U.S. 67, 77, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976) (stating that "[t]here are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." (citations omitted)); Leng May Ma v. Barber, 357 U.S. 185, 187, 78 S.Ct. 1072, 2 L.Ed.2d 1246 (1958) (stating that "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry' "); cf. Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (holding that illegal alien children have constitutional right to education). [FN21] Unlike the petitioners in Mezei and Barrera-Echavarria, Ma was admitted to and entered the United States as a refugee when he was a child, and has lived here ever since. He does not seek to "force us to admit him." Mezei, 345 U.S. at 210. The cases involving indefinite detention of excludable aliens simply do not support the constitutionality of indefinite detention of aliens who have entered the United States. To the contrary, our case law makes clear that, as a general matter, aliens who have entered the United States, legally or illegally, are entitled to the protections of the Fifth Amendment. [FN22]

The INS also argues that Barrera-Echavarria and Mezei control the result here because, for constitutional purposes, an alien ordered removed has no further right to be here and therefore stands on essentially the same footing as an excludable alien. [FN23] While this novel theory would dispose of the constitutional question raised by indefinite detention of such resident aliens, we cannot easily reconcile it with controlling case law. In particular, the INS's position appears to be clearly inconsistent

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with the Supreme Court's holding in Wong Wing that illegal aliens within the territorial jurisdiction of the U.S. who had been ordered deported could not be put to hard labor prior to their deportation. Wong Wing v. United States, 163 U.S. 228, 238, 16 S.Ct. 977, 41 L.Ed. 140 (1896). Although the INS argues that Wong Wing establishes only the proposition that irrational abuses against aliens who have been ordered deported are unjustified, Wong Wing makes clear that Congress deliberately created the hard labor policy "to promote its policy in respect to Chinese persons" (presumably by creating deterrence and encouraging voluntary departure). Wong Wing, 163 U.S. at 235, 237. The Court said nothing about "irrationality," only unconstitutionality. In short, it unanimously struck down, on Fifth Amendment grounds, Congress' policy with respect to aliens who had been ordered deported even though that policy was passed in furtherance of legitimate immigration goals. See also Landon v. Plasencia, 459 U.S. 21, 32- 34, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982) (holding that resident alien has due process rights in exclusion proceedings because her "constitutional status" is greater than that of a first-time entrant); Johnson v. Eisentrager, 339 U.S. 763, 771, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (holding that the Fifth Amendment grants rights to aliens within the territorial jurisdiction of the U.S., but not to those outside the territory). In order to adopt the INS's approach here, we would have to reconcile Wong Wing, which affords constitutional protection to aliens who have been ordered deported, with the INS's suggested rule--which would (by extending the constitutional jurisprudence governing excludable aliens to such aliens) strip them of such protection. That would be a daunting, if not impossible, task. [FN24]

*7 It is clear that the INS's effort to extend exclusion law to aliens who have entered the United States but have been ordered removed raises a substantial constitutional question, at the very least. Even if we were to agree with the Fifth Circuit's constitutional holding--and we do not by any means suggest that we do--we would first be required to answer that question. As we may avoid doing so by giving the statute a construction that does not require us to undertake any constitutional inquiry, we follow that course here.

We believe the construction of § 1231(a)(6) we adopt--that the INS may detain aliens who have entered the country but have been ordered removed only for "a reasonable time" beyond the ninety day statutory removal period, and specifically, that such aliens may not be detained beyond that statutory removal period if there is no reasonable likelihood that their country of origin will permit their return in the reasonably foreseeable future--to be the most plausible reading of the statute. However, we note that, in order to avoid the substantial constitutional concerns presented by the INS's interpretation, we could adopt a strained construction of the statute, one that would not otherwise constitute sound statutory construction. As one of our learned colleagues recently explained,

> *8 [S]tatutory construction and constitutional narrowing ... are, in fact, very different animals.... Constitutional narrowing seeks to add a constraint to the statute that its drafters plainly had not meant to put there; it is akin to partial invalidation of the statute. See, e.g., Regan v. Time, Inc., 468 U.S. 641, 652-654, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984). In performing the former task we may not add anything to the statute that is not already there ... in performing the latter function, we must do precisely that.... In performing our constitutional narrowing function, we may come up with any interpretation we have reason to believe Congress would not have rejected.

United States v. X-Citement Video, Inc., 982 F.2d 1285, 1295 n. 6 (9th Cir.) (Kozinski, J., dissenting), rev'd 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994). In reversing the majority, the Supreme Court endorsed our dissenting colleague's approach, holding that a statute should be construed to avoid constitutional problems so long as the saving construction is not "plainly contrary to the intent of Congress." 513 U.S. at 78. The discussion which follows will make clear that the construction we adopt is by no means plainly contrary to Congress's intent, but is instead the most reasonable interpretation of the statute.

IV.

The interpretation we give section 1231(a)(6) is clearly the most reasonable one. The provision that the INS may hold individuals "beyond" a specified time demonstrates Congress's intent that the otherwise applicable time limit not be deemed absolute in all cases, and that the agency have some

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flexibility in instances in which additional time may be useful. It does not demonstrate an intent to give the INS any greater authority than that--and certainly not an intent to permit the agency to hold people in detention for the remainder of their lives. Such is surely the case with respect to aliens who have entered the country and are generally entitled to the protections of our Constitution. It would indeed be surprising were Congress to attempt to authorize permanent or indefinite detention of such persons simply by providing that they may be held beyond a ninety day period. Some greater degree of specificity or demonstration of Congressional intent would be necessary before we would conclude that a statute had granted the INS so sweeping a power with regard to persons who are generally subject to the protections of the Constitution. We cannot presume that Congress would authorize so drastic a limitation on the rights of such aliens by so indirect a means, particularly when it could have easily included express language to that effect in the statute. [FN25]

To sustain the INS' indefinite detention theory we would be required to read far more ifito the statute than its language implies. In the simplest terms, to say that the INS may hold persons beyond a particular date does not answer the question "for how long?". The proper reading, we conclude, is that Congress intended only that the short statutory period during which detention is ordinarily authorized not serve as an absolute barrier to a reasonable extension of time when circumstances render an additional period necessary in order to accomplish the statutory purpose--the removal of the alien. Where no removal in the reasonably foreseeable future is possible, however, the statutory language, properly construed, does not authorize indefinite detention of such aliens. Because, here, there is no repatriation agreement and no demonstration of a reasonable likelihood that one will be entered into in the near future, we believe it to be not only the prudent but the correct interpretation of the statute to hold that Ma and others similarly situated aliens must be released, under supervision, at the end of the statutory removal period. 8 U.S.C. § 1231(a)(1)(A).

V.

*9 Our conclusion that a "reasonable time" limitation is implicit in the statute is supported by a venerable line of Ninth Circuit cases that held that a predecessor provision must be construed as allowing only for detention "reasonably" beyond the removal period.

Prior to 1952, the detention of aliens pending deportation was governed by the Immigration Act of 1917. That statute set no time limit to accomplish a deportation. The Act provided simply that deportable aliens should be "taken into custody and deported." [FN26] Then, just as now, there were cases involving aliens who could not be deported for various reasons--because the U.S. had no repatriation agreement with their country, because their country would not take them back, or because they were stateless. In several cases, this court held that while the deportation order would remain valid indefinitely, detention was justified only for a reasonable period. For example, in Caranica v. Nagle, 28 F.2d 955 (9th Cir.1928), the alien challenged an order mandating his deportation to Greece on the ground that he was a Macedonian citizen, not a Greek citizen. Id. at 956. The court upheld the order, holding that the statute allowed for deportation to Greece. The court held that the Secretary of Labor had broad discretion to find an appropriate country of deportation, but added that "the utmost the courts can or will do is to discharge the appellant from further imprisonment if the government fails to execute the order of deportation within a reasonable time." Id. at 957; see also Saksagansky v. Weedin, 53 F.2d 13, 16 (9th Cir.1931) (upholding deportation order to Russia (but not to China) and holding that petitioner must be released if he could not be deported to Russia); Wolck v. Weedin, 58 F.2d 928, 930-31 (9th Cir.1932) (upholding deportation order, but ruling, consistent with administrative practice, that alien should be released if deportation could not be effected within a reasonable time). See also United States ex rel. Ross v. Wallis, 279 F. 401, 403 (2d Cir.1922) (requiring release if deportation could not be effected within reasonable period). [FN27]

We recognized the continuing vitality of this rule in a case applying the 1917 Act that we decided in 1954. Spector v. Landon, 209 F.2d 481 (9th Cir.1954). In Spector, the petitioner was an alien who had been ordered deported in 1930, almost a quarter of a century earlier, and had been out on bond for most of the intervening period, but whose deportation the government had been unable to

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accomplish for various diplomatic reasons. Id. at 482. He argued that as a result of the passage of time the deportation order was no longer valid. We rejected this contention, stating that

> *10 No cases have been found by counsel holding that a deportation warrant becomes invalid or unenforceable through mere lapse of time.... There are a number of decisions in habeas corpus to the effect that the right to hold the alien in custody under a deportation warrant persists for no more than a reasonable period. But such holdings lend no color to the contention made here.

Id. (emphasis added) (citations omitted). Thus, even as we denied Spector's claim, we recognized that the 1917 Act did not authorize indefinite detention pending deportation even though the statute did not, by its terms, place any temporal limit on the government's authority; we read the statute as containing an implicit provision that detention was authorized only for a "reasonable period."

While these older cases did not interpret a statute exactly like the one we consider today, because the 1917 Act made no distinction between aliens whose release following the removal period was required and aliens who could be detained following that period, both the 1917 statute and the current law provide for custody pending deportation and set forth no specific time limitations as to the period of detention. Although these older cases do not make their reasoning entirely explicit, they appear to rely on the principle that, when faced with the absence of an express time limitation, courts should ordinarily not assume that Congress intended a result as harsh and constitutionally dubious as indefinite detention. That principle seems as valid today as it was under the 1917 Act. We too are faced with a statute that does not contain an express statutory proscription against release. Like the courts interpreting the 1917 Act, we assume that the statute implicitly provides for a reasonable limitation on the length of detention. In doing so, we refuse to presume that Congress authorized the indefinite detention of resident aliens long after they have finished serving their sentence merely because their country does not have a repatriation agreement with the United States.

VI.

In interpreting the statute to include a reasonable time limitation, we are also influenced by amicus curiae Human Rights Watch's argument that we should apply the well-established Charming Betsy rule of statutory construction which requires that we generally construe Congressional legislation to avoid violating international law. Weinberger v. Rossi, 456 U.S. 25, 32, 102 S.Ct. 1510, 71 L.Ed.2d 715 (1982) (citing Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 117-118, 2 L.Ed. 208 (1804)). We have reaffirmed this rule on several occasions. In United States v. Thomas, 893 F.2d 1066, 1069 (9th Cir.1990), we explained that we adhere to this principle "out of respect for other nations." Id. at 1069 (citing Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir.1984)); see also In re Simon, 153 F.3d 991, 998 (9th Cir.1998).

We recently recognized that "a clear international prohibition" exists against prolonged and arbitrary detention. Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir.1998). [FN28] Furthermore, Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which the United States has ratified, see 138 Cong. Rec. S4781-84 (Apr. 2, 1992), provides that "[n]o one shall be subjected to arbitrary arrest and detention." See International Covenant on Civil and Political Rights, opened for signature, Dec. 19, 1966, 999 U.N.T.S. 171, 21 U.N. GAOR Supp. (No. 16) at 54, entered into force Mar. 23, 1976, at Art. 9(1); see also Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984) (holding that ambiguous Congressional action should not be construed to abrogate a treaty).

*11 In the present case, construing the statute to authorize the indefinite detention of removable aliens might violate international law. In Martinez, 141 F.3d 1373, we expressed our approval of a district court decision in this circuit holding that "individuals imprisoned for years without being charged were arbitrarily detained" in violation of international law, id. at 1384 (citing Forti v. Suarez-Mason, 672 F.Supp. 1531, 1541 (N.D.Cal.1987)). Given the strength of the rule of international law, our construction of the statute renders it consistent with the Charming Betsy rule.

Conclusion.

In the face of these compelling statutory arguments,

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we do not read § 1231(a)(6) as authorizing the indefinite detention of removable aliens. Rather, we hold that the statute authorizes the Attorney General to detain removable aliens only for a reasonable time beyond the ninety day removal period. While we could reach this construction of the statute simply by invoking the doctrine of constitutional avoidance, it is not necessary to rest our decision on that legal principle. As the above discussion makes clear, ordinary tenets of statutory construction lead us to that same result. What constitutes a reasonable time will depend on the circumstances of the various cases. Here, we need not address all the conceivable situations that could arise to delay or preclude removal. We need hold only that where it is reasonably likely that an alien who has entered the United States cannot be removed in the reasonably foreseeable future, detention beyond the removal period is not justified. [FN29]

In Ma's case, the district court did not err in concluding that there is not a reasonable likelihood that the INS will be able to remove Ma to Cambodia. Although the INS offered evidence that the State Department has submitted a proposal for a repatriation agreement to the Cambodian government, both sides agree that the United States has no functioning repatriation agreement with that country, that the Cambodian government does not presently accept the return of its nationals from the United States, and that it has not announced a willingness to enter into an agreement to do so in the foreseeable future, (or indeed at any time). In the absence of a repatriation agreement, extant or pending, we must affirm the district court's finding that there is no reasonable likelihood that the INS will be able to accomplish Ma's removal. [FN30] Under these circumstances, the INS may not detain Ma any longer.

We stress that our decision does not leave the government without remedies with respect to aliens who may not be detained permanently while awaiting a removal that may never take place. All aliens ordered released must comply with the stringent supervision requirements set out in 8 U.S.C. § 1231(a)(3). Ma will have to appear before an immigration officer periodically, answer certain questions, submit to medical or psychiatric testing as necessary, and accept reasonable restrictions on his conduct and activities, including severe travel limitations. More important, if Ma engages in any criminal activity during this time, including violation of his supervisory release conditions, he can be detained and incarcerated as part of the normal criminal process. [FN31]

*12 For the foregoing reasons, the district court's decision is

AFFIRMED.

FN1. There are also many aliens from Laos and Vietnam who cannot be removed because our government has no repatriation agreement with those countries.

FN2. In the district court in which Ma sought relief, over one hundred habeas corpus petitioners challenged their ongoing detention by the INS in cases similar to his. The district court designated five lead cases that presented issues common to all petitioners and directed the parties to brief and argue those issues before five district court judges. The five district court judges issued a joint order establishing a legal framework to apply in each individual case. A single judge then applied this ruling to Ma and held that he should be released. Similar cases involving a large number of habeas petitioners have arisen in Nevada, and the Central, Eastern, and Southern Districts of California.

FN3. Although neither party has argued either that the district court lacked jurisdiction over Ma's constitutional claims or that this court lacks jurisdiction to hear this appeal, the INS argued at one point in its brief that the general federal habeas statute, 28 U.S.C. § 2241, does not provide jurisdiction to hear any claim of statutory error or abuse of discretion. However, our recent decision in Magana-Pizano v. INS, 200 F.3d 603 (9th Cir.1999), makes clear that the scope of review under the general federal habeas statute, 28 U.S.C. § 2241, has not been limited by 8 U.S.C. § 1252, because that section does not mention habeas corpus explicitly. Id. at 609 (citing Felker v. Turpin, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996)). Claims of statutory error and abuse of discretion in the application of the immigration laws have long been cognizable on habeas corpus. See Magana-Pizano, 200 F.3d at 609 (holding that general habeas statute allows review of statutory questions); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954) (reviewing denial of discretionary relief (suspension of deportation) on the merits, and reversing on ground that discretion was not exercised consistent with the statute). Thus, we hold

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that 8 U.S.C. § 1252 does not preclude us from considering Ma's non- constitutional arguments on habeas corpus.

FN4. The Cambodian government denied the request, as it does all such requests, because of the absence of a repatriation agreement.

FN5. Internal INS regulations (known as the "Pearson I" regulations) required that Ma's case be reviewed before the end of the ninety day period. However, Ma received his custody review approximately 100 days after that period had run (190 days after his removal order became final).

FN6. 8 C.F.R. § 241.4.

FN7. The letter also stated that Ma's case would be reviewed again six months from the date of the letter, on December 2, 1999. It also stated that Ma had the right to submit a request for redetermination of his custody status at any time.

FN8. After Ma and the other four lead petitioners prevailed in district court, the INS implemented additional regulations, known as the "Pearson II" regulations, which provided for additional review of custody decisions. These regulations provide for review of the decisions of district directors by INS Headquarters, which was then done in this case.

FN9. The INS sought to stay the district court's release order. The district court denied the order but granted the INS a temporary stay so that it might attempt to secure an emergency stay from this court. We denied the stay. The INS filed a second emergency stay request, pending appeal to the Supreme Court. We again denied the stay and ordered Ma released. He was released that evening. The INS then sought a stay from the Supreme Court. Justice O'Connor ordered a temporary stay pending a review by the whole Court. Ma surrendered to INS custody pending the Court's decision. The Court denied the INS's stay request, and Ma was again ordered released.

FN10. See 8 U.S.C. § 1231(a)(1)(A)-(B). If the removal order is stayed pending judicial review, the ninety day period begins running after the reviewing court's final order. 8 U.S.C. § 1231(a)(1)(B)(ii).

FN11. See, e.g., Caranica v. Nagle, 28 F.2d 955 (9th Cir.1928) (involving deportation order to Greece of alien born in Macedonia, which was then a Turkish province that was later partitioned among several countries, including Greece, where Greece would not recognize alien as a citizen).

FN12. The sub-section provides in full that [a]n alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3). 48 U.S.C. § 1231(a)(6).

FN13. Although we recognize that, in general, the Attorney General's interpretation of the immigration laws is entitled to substantial deference, INS v. Aguirre-Aguirre, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999), we have held that Chevron principles (Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)) are not applicable where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized to construe. Williams v. Babbitt, 115 F.3d 657, 661-63 (9th Cir.1997) (analyzing DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) and Rust v. Sullivan, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), noting the agency's lack of constitutional expertise, and concluding that "just as we will not infer from an ambiguous statute that Congress meant to encroach on constitutional boundaries, we will not presume from ambiguous language that Congress intended to authorize an agency to do so"). As we explain infra, the agency's interpretation raises just such a substantial question.

FN14. Petitioner also contests the procedures used by INS when considering his requests for release, asserting that they violate procedural due process. Given our holding, we need not reach that constitutional question either.

FN15. The Court has also described the canon as applying to "difficult," "serious," or "grave" constitutional issues. See, e.g., United States v. Winstar Corp., 518 U.S. 839, 875, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996); Allentown Mack Sales v. NLRB, 522 U.S. 359, 387, 118 S.Ct. 818, 139 L.Ed.2d 797 (1998) (Rehnquist, CJ, concurring in part and dissenting in part); Jones v. United States, 526 U.S. 227, 239, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). Regardless of the terminology used, the point seems to be the same: a party cannot force us to ignore the usual canons of statutory construction by raising a frivolous, insubstantial, or patently

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incorrect constitutional argument. Nor, as the Court put it in United States v. Locke, 471 U.S. 84, 96, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985), may we resort to "disingenuous evasion" in our interpretation of the statute to avoid a constitutional question.

FN16. The INS also makes repeated reference to Carlson v. Landon, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952). However, Carlson upheld the constitutionality of detention pending the INS's decision whether to deport an alien, and expressly noted that the problem of "unusual delay" was not before it, and referenced a case involving a Russian petitioner who alleged that his country would not accept his return. Id. at 546 (citing United States ex rel. Potash v. District Director, 169 F.2d 747, 748 (2d Cir.1948)).

FN17. Although the INS notes that the plaintiff in Mezei was previously a lawful resident of the U.S. for twenty-five years, the Court made clear that he was to be treated as an excludable alien because of his long departure from the U.S., and could not have his status "assimilated" to that of a permanent resident. In doing so, the Court distinguished, on its facts, its then-recent decision in Kwong Hai Chew v. Colding, 344 U.S. 590, 73 S.Ct. 472, 97 L.Ed. 576 (1953), which authorized such assimilation of status under some circumstances. Mezei, 345 U.S. at 213-14. There is no doubt that Mezei was considered by the Court to be an excludable alien who had not entered the U.S., despite what the Court referred to as his "prior residence here." See Mezei at 212-13.

FN18. Barrera-Echavarria was paroled while excluded, committed numerous crimes, and thereafter was taken back into custody. Barrera-Echavarria, 44 F.3d at 1444. His parole did not constitute an entry. Leng May Ma v. Barber, 357 U.S. 185, 188, 78 S.Ct. 1072, 2 L.Ed.2d 1246 (1958).

FN19. Amici Law Professors note in their brief that in its petition for rehearing en banc which led to the Barrera-Echavarria decision the INS relied on the fact that the petitioner was an alien seeking admission (rather than one who had entered).

FN20. In Barrera-Echavarria, we concluded that the statutes there at issue, which applied only to the detention of excludable aliens, allowed for the long-term detention of such aliens, id. at 1445, and went on to hold that such detention is constitutional. There is no inconsistency between our statutory holding in Barrera-Echavarria and our statutory holding here. We found the statutory authority to hold Barrera-Echavarria for a prolonged period implicit in the history and structure of several provisions granting broad discretion to the Attorney General to parole excludable aliens into the country under certain circumstances. Id. at 1445-48. We noted that the parole of excludable aliens had always been the exception rather than the rule, and that releasing such aliens into the country pending deportation would run contrary to the basic statutory scheme precluding such entry. Id. at 1447. In the case before us, we consider the entirely different question of aliens who have already entered the country. Thus, unlike in Barrera-Echavarria, there is no long- standing statutory scheme that would be "upset" by barring prolonged detention here. Id. at 1446. Most important, because in Barrera-Echavarria the various statutory provisions at issue did not apply to the detention of aliens who had already entered the United States, there was no need to invoke the canon of constitutional avoidance. The constitutional result in Barrera-Echavarria was dictated by the Supreme Court's holding in Mezei regarding excludable aliens.

FN21. The cases extending Fifth Amendment protection to aliens are fully consistent with our general jurisprudence granting significant constitutional protections to aliens within the territory of the United States. The Supreme Court has held that the Equal Protection Clause applies to aliens, Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), that the Fourth Amendment applies to aliens (within U.S. territory), Almeida-Sanchez v. United States, 413 U.S. 266, 274, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973), and that the First Amendment applies to aliens. Bridges v. Wixon, 326 U.S. 145, 148 (1945) (holding that "freedom of speech and of press is accorded aliens residing in this country"); Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941) (same).

FN22. The INS cites Fong Yue Ting v. United States, 149 U.S. 698, 711- 13, 13 S.Ct. 1016, 37 L.Ed. 905 (1893), for the proposition that "[t]he power to exclude aliens, and the power to expel them, rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power." Id. at 713. However, that proposition as applied to the distinction between the constitutional rights of deportable and excludable aliens is no longer good law. The Court in Fong Yue Ting went on to hold that aliens may be deported using processes exercised "entirely through executive officers." Id. at 714. That part of Fong Yue Ting 's holding was overruled ten years later, when the Supreme Court

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held that deportation proceedings for aliens within the U.S. must conform to due process. Yamataya v. Fisher, 189 U.S. 86, 101, 23 S.Ct. 611, 47 L.Ed. 721 (1903).

FN23. We note that the Fifth Circuit relied on the INS's argument in resolving the constitutional question we avoid today, holding that long- term detention of removable aliens who have been ordered deported does not violate substantive due process. Zadvydas v. Underdown, 185 F.3d 279 (5th Cir.1999). Although we seriously question the Fifth Circuit's conclusion in that case, and in particular its reading of Wong Wing v. United States, 163 U.S. 228, 238, 16 S.Ct. 977, 41 L.Ed. 140 (1896), and Landon v. Plasencia, 459 U.S. 21, 32-34, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982), we need not reach the constitutional question here. At the very least, it is clear from reading Zadvydas that a substantial constitutional question exists regarding the construction of § 1231(a)(6).
Following oral argument, the Tenth Circuit considered the constitutional question in Ho v. Greene, 204 F.3d 1045, 2000 WL 228755 (10th Cir. Feb.29, 2000), and, by a 2-1 vote, accepted the Fifth Circuit's view. Moreover, the Tenth Circuit concluded that because § 1231(a)(6) was silent as to any time duration, "Congress intended to and expressly did authorize the Attorney General to indefinitely detain certain removable aliens." Id. at *9. For the reasons stated below, we do not find the Tenth Circuit's reasoning persuasive.

FN24. The INS also argues that all immigration-related decisions are entitled to substantial deference under the plenary power, citing Reno v. Flores, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). However, it is not clear what role the plenary power played in Flores. In that case, the Court found that rational basis review applied, noted that the plenary power was applicable, but then stated that "[o]f course, the INS regulation must still meet the (unexacting) standard of rationally advancing some legitimate governmental purpose." Flores, 507 U.S. at 306. Ma argues that the plenary power's general deference rule does not apply in every case, citing INS v. Chadha, 462 U.S. 919, 940-41, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (striking down law governing suspension of deportation, stating that "what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing [the plenary] power.... Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction." (internal citation omitted)) and Hampton v. Mow Sun Wong, 426 U.S. 88, 99-101, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976) (striking down Civil Service Commission's blanket ban on employing non-citizens and rejecting contention that "the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens"). It is not clear why the plenary power's deference rule should apply here given that such deference was not afforded in Chadha or in Hampton. In any event, the Supreme Court's cases make clear that the plenary power doctrine does not apply in the same way to each case to which it is relevant, and that its exercise is subject to constitutional restraints.

FN25. In the prior statute, Congress used language prohibiting release (subject to some exceptions) rather than the language authorizing detention used here. See 8 U.S.C. § 1252(a)(2)(B) (1995) (stating that the "Attorney General may not release [deportable aliens convicted of an aggravated felony] ... either before or after a determination of deportability [subject to some exceptions].") (emphasis added). The two custody provisions that succeeded the 1995 version of this law (and preceded the current version) did not change this language in any way relevant to our analysis. The same "may not release ... either before or after" language was in both statutes. See AEDPA § 440(c); IIRIRA § 303(b)(3) (the transitional custody rule). The prohibitory language used there is obviously far stronger than the permissive language used in the new law. More important, however, Congress is familiar with time limitations in the detention and removal context, and could easily have authorized detention "without limitation" or "indefinitely" if it so desired. See, e.g., 8 U.S.C. § 1231(a)(1)(A); 1231(a)(1)(C); 1231(b)(2)(C); 1231(b)(2)(D); 1231(c)(3)(A); 1231(c)(3)(B) (all specifying various time periods in detention and removal context).

FN26. See An Act To Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, ch. 29, § 19, 39 Stat. 874, 889 (1917).

FN27. Notably, the "reasonable time" allowed to effectuate deportation in such cases seems to have been quite short by contemporary standards. In Caranica the court held that a two month deadline was not an abuse of discretion, 28 F.2d at 957, while in Wolck the court gave the government thirty days to implement the order, 58 F.2d at 931; in Wallis the Second Circuit required release after four months. 279 F. at 404.

FN28. This court has held that within the domestic legal structure, international law is displaced by "a

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properly enacted statute, provided it be constitutional, even if that statute violates international law." Alvarez-Mendez v. Stock, 941 F.2d 956, 963 (9th Cir.1991) (involving prolonged detention of excludable aliens); see also Barrera-Echavarria v. Rison, 44 F.3d 1441, 1451 (9th Cir.1995). Those rulings, however, do not suggest that courts should refrain from applying the Charming Betsy principle. Rather, they stand for the proposition that when Congress has clearly abrogated international law through legislation, that legislation nonetheless has the full force of law. See Restatement (Third) of International Law § 115(1)(a) ("An Act of Congress supercedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supercede the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled"). Although Congress may override international law in enacting a statute, we do not presume that Congress had such an intent when the statute can reasonably be reconciled with the law of nations.

FN29. We recognize that our reference to aliens who have already entered is, in one sense, too broad. Aliens who entered the United States in the past but have since left for a significant time have no more constitutional rights than first-time would-be entrants. See Landon, 459 U.S. at 30; Mezei, 345 U.S. at 213. They are considered "excludable."

FN30. We note that our construction of the statute does not require us to "second-guess" or otherwise interfere with the foreign policy actions of the United States government. On the contrary, we have taken at face value the evidence submitted by a State Department officer regarding the status of the government's attempts to establish a repatriation agreement with Cambodia. He has candidly stated that he cannot predict when a repatriation agreement will be established and begin to function.

FN31. We note that the regulations governing Ma's release state that he can be detained for violating them, and moreover that violations of supervisory release conditions are punishable by fine and/or imprisonment under 8 U.S.C. § 1253(b).

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Duy Dac HO, Petitioner-Appellee,
v.
Joseph GREENE, District Director, Immigration and Naturalization Service, Respondent-Appellant.
Loi Tan Nguyen, Petitioner-Appellee,
v.
Joseph Greene, District Director, Immigration and Naturalization Service, Respondent-Appellant.
American Immigration Lawyers Association, National Immigration Project of the National Lawyer's Guild, Justice Information Center, Inc., Human Rights Watch, Human Rights Advocates, World Organization Against Torture USA, Jesuit Refugee Service, International Human Rights Law Group, and the Extradition and Human Rights Committee of the American Branch of the International Law Association, University of Colorado Legal Aid & Defender Program, Amici Curiae.

Nos. 98-1333, 99-1256, 99-1182.

United States Court of Appeals,
Tenth Circuit.

Feb. 29, 2000.

Aliens who had been ordered removed from United States but whose return had not been accepted by their country of origin filed separate habeas petitions challenging their indefinite detention pending execution of final removal orders. The United States District Court for the District of Colorado, Wiley Y. Daniel, granted petitions. Immigration and Naturalization Service (INS) appealed, and appeals were consolidated. The Court of Appeals, Murphy, Circuit Judge, held that: (1) District Court had jurisdiction to consider aliens' habeas claims to extent transitional provisions of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) or pre-IIRIRA provisions of Immigration and Nationality Act (INA) applied to them, (2) as matter of first impression, District Court had jurisdiction to consider aliens' habeas claims to extent permanent provisions of IIRIRA applied to them; (3) Attorney General is required indefinitely to detain, after entry of final order of exclusion, excludable alien who has been convicted of aggravated felony, absent determination that alien does not pose danger to safety of other persons or to property; (4) IIRIRA confers statutory authority on Attorney General to indefinitely detain alien who cannot be removed during removal period if alien has been found to be risk to community or unlikely to comply with removal order; and (5) aliens did not have liberty interest in being released from custody.

Reversed and remanded.

Brorby, Circuit Judge, dissented and filed opinion.

[1] HABEAS CORPUS ⇐521
197k521
District court had jurisdiction over aliens' habeas petitions challenging their detention pending execution of final removal orders, to extent transitional provisions of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) or pre-IIRIRA provisions of Immigration and Nationality Act (INA) applied to them. 28 U.S.C.A. § 2241.

[2] HABEAS CORPUS ⇐521
197k521
To extent permanent provisions of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) applied to aliens being detained pending execution of final removal orders, district court was not deprived of jurisdiction over their habeas petitions challenging such detention by IIRIRA section barring judicial review of Attorney General's discretionary decisions to commence proceedings, adjudicate cases, or execute removal orders, inasmuch as aliens did not ask for review of such decisions. Immigration and Nationality Act, § 242(g), as amended, 8 U.S.C.A. § 1252(g); 28 U.S.C.A. § 2241.

[3] HABEAS CORPUS ⇐521
197k521
To extent permanent provisions of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) applied to aliens being detained pending execution of final removal orders, district court was not deprived of jurisdiction over their habeas petitions challenging such detention by IIRIRA section precluding court jurisdiction over certain decisions of Attorney General specified by IIRIRA as being discretionary. Immigration and Nationality Act, § 242(a)(2)(B)(ii), as amended, 8 U.S.C.A. § 1252(a)(2)(B)(ii); 28 U.S.C.A. § 2241.

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[4] FEDERAL COURTS ⇐776
170Bk776
The interpretation of a federal statute is a question of law reviewed de novo.

[5] ADMINISTRATIVE LAW AND PROCEDURE ⇐683
15Ak683
A district court's resolution of claims alleging constitutional violations by an agency is reviewed de novo.

[6] ALIENS ⇐53.9
24k53.9
The section of the Immigration and Nationality Act (INA) of 1990 authorizing the Attorney General to take into custody an alien who has been convicted of an aggravated felony pending a determination of the alien's excludability authorizes the Attorney General to continue to detain an excludable alien who has been convicted of an aggravated felony after the entry of a final order of exclusion. Immigration and Nationality Act, § 236(e), as amended, 8 U.S.C.A. § 1226(e).

[7] ALIENS ⇐53.9
24k53.9
Under the Immigration and Nationality Act (INA) of 1990, the Attorney General must continue indefinitely to detain, after entry of a final order of exclusion, an excludable alien who has been convicted of an aggravated felony unless a review of the alien's request for relief concludes that the alien does not pose a danger to the safety of other persons or to property. Immigration and Nationality Act, § 236(e), as amended, 8 U.S.C.A. § 1226(e).

[8] ALIENS ⇐53.9
24k53.9
The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) confers on the Attorney General the statutory authority to indefinitely detain an alien who cannot be removed during his or her removal period if that alien has been found to be a risk to the community or unlikely to comply with the removal order. Immigration and Nationality Act, § 241(a)(6), as amended, 8 U.S.C.A. § 1231(a)(6).

[9] CONSTITUTIONAL LAW ⇐70.1(11)
92k70.1(11)
The Court of Appeals will not substitute its judgment for that of Congress by reading into a statute a time limit that is not included in the plain language of the statute.

[10] ALIENS ⇐53.9
24k53.9
Aliens who had been ordered removed from United States but whose return had not been accepted by their country of origin did not have liberty interest protected by due process clause in being released from custody of Attorney General, notwithstanding their presence in United States and fact that one of them was formerly a lawful permanent resident. U.S.C.A. Const.Amend. 5.

[10] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Aliens who had been ordered removed from United States but whose return had not been accepted by their country of origin did not have liberty interest protected by due process clause in being released from custody of Attorney General, notwithstanding their presence in United States and fact that one of them was formerly a lawful permanent resident. U.S.C.A. Const.Amend. 5.

[11] CONSTITUTIONAL LAW ⇐251.2
92k251.2
The due process protection of the Fifth Amendment has two components, a substantive due process component and a procedural due process component. U.S.C.A. Const.Amend. 5.

[11] CONSTITUTIONAL LAW ⇐251.5
92k251.5
The due process protection of the Fifth Amendment has two components, a substantive due process component and a procedural due process component. U.S.C.A. Const.Amend. 5.

[12] CONSTITUTIONAL LAW ⇐251.2
92k251.2
The substantive component of the Fifth Amendment's due process clause precludes the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty. U.S.C.A. Const.Amend. 5.

[13] CONSTITUTIONAL LAW ⇐255(1)
92k255(1)
The procedural component of the Fifth Amendment's due process clause precludes the

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government from depriving a person of life, liberty, or property in an unfair manner. U.S.C.A. Const.Amend. 5.

[13] CONSTITUTIONAL LAW ⇐278(1)
92k278(1)
The procedural component of the Fifth Amendment's due process clause precludes the government from depriving a person of life, liberty, or property in an unfair manner. U.S.C.A. Const.Amend. 5.

[14] CONSTITUTIONAL LAW ⇐254.1
92k254.1
Substantive and procedural due process claims must be supported by an underlying liberty interest. U.S.C.A. Const.Amend. 5.

[15] CONSTITUTIONAL LAW ⇐254.1
92k254.1
A liberty interest protected by the due process clause can arise in one of two ways: (1) from the due process clause itself, or (2) from a state or federal statute. U.S.C.A. Const.Amend. 5.

[16] CONSTITUTIONAL LAW ⇐252.5
92k252.5
Any due process analysis must begin with a careful description of the asserted right. U.S.C.A. Const.Amend. 5.

[17] CONSTITUTIONAL LAW ⇐252
92k252
Aliens who are physically present in the United States but who are not lawful permanent residents are entitled to some of the protections afforded by the Fifth Amendment. U.S.C.A. Const.Amend. 5.

[18] ALIENS ⇐4
24k4
Physical presence in the United States alone does not confer heightened constitutional rights on an alien seeking admission to the United States.

[19] ALIENS ⇐4
24k4
While aliens physically present in the United States are "persons" afforded some Fifth Amendment rights, they have no constitutional rights regarding their application for admission to the United States. U.S.C.A. Const.Amend. 5.

[19] CONSTITUTIONAL LAW ⇐252
92k252
While aliens physically present in the United States are "persons" afforded some Fifth Amendment rights, they have no constitutional rights regarding their application for admission to the United States. U.S.C.A. Const.Amend. 5.

[20] ALIENS ⇐53
24k53
Notwithstanding their physical presence in the United States, aliens subject to final removal orders have no greater constitutional rights with respect to their applications for admission than an alien seeking to enter the United States for the first time.

[21] ALIENS ⇐53.6(2)
24k53.6(2)
Once a removal order has become final and an alien who was formerly a lawful permanent resident seeks temporary re-entry into the United States, the alien possesses identical constitutional rights with respect to his or her application for admission as an excludable alien.

***1048** Emily Anne Radford, Senior Litigation Counsel, Office of Immigration Litigation, (Allen W. Hausman, Senior Litigation Counsel; David M. McConnell, Assistant Director; and H. Bradford Glassman, Trial Attorney, Office of Immigration Litigation, with her on the briefs), Department of Justice, Washington, D.C., for Respondent-Appellant.

Judy Rabinovitz, ACLU Immigrants' Rights Project, New York, New York, (Jim Salvator, Lafayette, Colorado; Wanyong Austin, ACLU Immigrants' Rights Project, New York, New York; Mark Silverstein, ACLU Foundation of Colorado, Denver, Colorado; Kathryn Palamountain, ACLU Immigrants' Rights Project, San Francisco, California, with her on the briefs), for Petitioners-Appellees.

Ken Stern, Stern & Elkind, Denver, Colorado; Christine C. Bartlett, Justice Information Center, Denver, Colorado; and Norman Aaronson, Legal Aid & Defender Program, University of Colorado, Boulder, Colorado, filed an Amici Curiae Brief for American Immigration Lawyers Association, National Lawyer's Guild, Justice Information Center, and University of Colorado Legal Aid & Defender Program.

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Sheldon Friedman, Isaacson, Rosenbaum, Woods & Levy, P.C., Denver, Colorado; Paul L. Hoffman, Bostwick & Hoffman, LLP, Santa Monica, California; and William J. Aceves, California Western School of Law, San Diego, California, filed an Amici Curiae Brief for Human Rights Watch, Human Rights Advocates, World Organization Against Torture USA, Jesuit Refugee Service, International Human Rights Law Group, and The Extradition and Human Rights Committee of the American Branch of the International Law Association.

Before BRORBY, BRISCOE, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

Petitioners-Appellees, Duy Dac Ho ("Ho") and Loi Tan Nguyen ("Nguyen") (collectively "Petitioners") were each convicted of aggravated felonies and ordered removed from the United States. Upon release from state prison, each Petitioner was taken into custody by the Immigration and Naturalization Service ("INS"). Because their country of origin, Vietnam, would not accept their return, Petitioners were detained in an INS detention facility. Petitioners each filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. In their habeas petitions, Petitioners did not contest their deportability. Rather, both argued that the Attorney *1049 General [FN1] lacks statutory authority to detain them indefinitely pending execution of the final removal order and that their continued detention violates the Constitution of the United States. The district court granted both petitions [FN2] and ordered Petitioners released from INS custody on bond. The INS appealed and the cases were consolidated. This appeal presents the question of whether the Attorney General has the statutory authority to indefinitely detain a removable alien. Because this court determines such detention to be statutorily authorized, we also address whether such detention violates any substantive or procedural due process rights afforded removable aliens by the Fifth Amendment. Exercising jurisdiction under 28 U.S.C. § 1291, we reverse.

FN1. The Attorney General is charged with the administration and enforcement of all laws relating to the immigration and naturalization of aliens. See 8 U.S.C. § 1103(a)(1). Pursuant to the authority conferred on her by 8 U.S.C. § 1103(a), the Attorney General has delegated her authority to enforce all laws relating to the immigration and naturalization of aliens to the Commissioner of the INS who, in turn, may redelegate any such authority to any other officer or employee of the INS. See 8 C.F.R. § 2.1.

FN2. Although the district court granted both habeas petitions to the extent Petitioners sought release on bail, the court denied the requests for attorneys' fees and costs made in the petitions. The district court's denial of attorneys' fees and costs has not been appealed by either Ho or Nguyen.

I. FACTUAL BACKGROUND

A. No. 98-1333

Petitioner-Appellee Ho is a citizen and national of Vietnam. Ho lawfully entered the United States as a refugee in 1985. Ho has never applied for and, consequently, never obtained lawful permanent resident status. In 1988, Ho was sentenced to thirty-three months' imprisonment for aggravated robbery, assault, and burglary. In 1992, he was sentenced to an additional seventy-eight months' imprisonment for a second aggravated robbery committed in 1991. On June 24, 1996, following an exclusion hearing, Ho was ordered excluded from the United States. Ho did not appeal the order of exclusion. Ho was released from the custody of the Minnesota Department of Corrections to the INS for deportation and has been in INS custody since June 1996. The INS formally requested travel documents for Ho from the Vietnamese government on July 11, 1996. The Vietnamese government has not issued the requested travel documents. On January 22, 1998, the INS denied Ho's request for immigration parole, stating there were no "urgent humanitarian reasons" justifying parole and that Ho had failed to demonstrate that he would not be a public danger, or that he would not flee.

On April 16, 1998, Ho filed a petition with the United States District Court for the District of Colorado seeking a writ of habeas corpus. In his petition, Ho alleged that his continued detention by the INS was not authorized by statute and violated his constitutional due process rights. The district court, relying on this court's opinion in Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir.1981), granted the writ and ordered Ho released on bond. The INS appealed.

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B. No. 99-1182

Petitioner-Appellee Nguyen is a native and citizen of Vietnam. Nguyen entered the United States as a refugee in 1981 and obtained lawful permanent resident status in 1984. On January 5, 1993, Nguyen was convicted of aggravated robbery and vehicular eluding and sentenced to a thirteen-year term of imprisonment. The INS initiated deportation proceedings against Nguyen on January 10, 1994, and he was ordered deported on January 8, 1996. Nguyen appealed this decision but his appeal was dismissed on January 10, 1997 and his motion for reconsideration was denied on July 7, 1997. Nguyen was released from incarceration by the state of Colorado and paroled into the custody of *1050 the INS for deportation on August 12, 1997. The INS formally requested travel documents for Nguyen from the Vietnamese government on October 2, 1997. The Vietnamese government has not issued the requested travel documents.

On at least two occasions, Nguyen has requested to be released from INS custody. The INS has denied each of Nguyen's requests for release. In December, 1998, the INS's Acting District Director for the Denver District denied Nguyen's most recent request for release, concluding that Nguyen failed to show, by clear and convincing evidence, that he does not pose a safety or flight risk if released.

On June 22, 1998, Nguyen filed a petition with the United States District Court for the District of Colorado seeking a writ of habeas corpus and alleging that his continued detention was not authorized by statute and violated his Fifth Amendment substantive and procedural due process rights. The district court, relying on this court's opinion in Rodriguez-Fernandez, granted the writ and ordered Nguyen released on bond. See id. The INS brought this appeal.

II. DISCUSSION

A. Jurisdiction

Although neither Petitioners nor the INS challenge the jurisdiction of either the district court or this court, this court must address this predicate question before proceeding to the merits of these appeals. See Arizonans for Official English v. Arizona, 520 U.S. 43, 73, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997).

On September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). See Pub.L. No. 104-208, 110 Stat. 3009, 3009-546 (1996). IIRIRA made comprehensive changes to the Immigration and Nationality Act (INA). As a result of the enactment of IIRIRA, no fewer than three versions of the INA may govern the jurisdictional question before this court. Generally, the permanent provisions of IIRIRA apply only to removal proceedings commenced after April 1, 1997, IIRIRA's effective date. See IIRIRA § 309(a), Pub.L. No. 104-208, 110 Stat. 3009, 3009-625. Exclusion proceedings against Ho were commenced prior to IIRIRA's April 1, 1997 general effective date. Deportation proceedings against Nguyen were also commenced prior to April 1, 1997. Arguably, therefore, the permanent provisions of IIRIRA do not govern judicial review of the § 2241 habeas petitions filed by Ho and Nguyen. At least one Circuit Court of Appeals, however, has concluded that the effective-date provisions of IIRIRA are ambiguous and has held that the permanent provisions of IIRIRA govern judicial review of habeas corpus petitions filed by aliens against whom removal proceedings had commenced prior to April 1, 1997 but who had also received final removal orders before that date. See Zadvydas v. Underdown, 185 F.3d 279, 287 & 286 n. 7 (5th Cir.1999). Because both Ho and Nguyen received final removal orders before April 1, 1997, [FN3] the permanent provisions of IIRIRA thus may apply.

FN3. Ho did not appeal the final order of exclusion which was entered against him on June 24, 1996. Nguyen's appeal of his final order was dismissed on January 10, 1997. His motion for reconsideration was denied on July 7, 1997 as untimely.

IIRIRA also contains transitional rules applicable to removal proceedings commenced before April 1, 1997, in which deportation orders became administratively final after October 30, 1996. See IIRIRA § 309(c)(4), Pub.L. No. 104-208, 110 Stat. 3009, 3009-626. Because Ho's removal order became final before October 30, 1996, the transitional rules do not apply to his petition. Removal proceedings against Nguyen, however, commenced prior to April 1, 1997, and his deportation order became final after October 30, 1996. The transitional rules, thus, may govern

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judicial review of Nguyen's habeas petition. We need not and do not decide which *1051 version of the INA applies because neither the permanent, transitional, nor pre-IIRIRA provisions of the INA bar judicial review of the claims brought by Ho and Nguyen in their § 2241 habeas petitions.

[1] Before IIRIRA, district courts had jurisdiction over § 2241 habeas petitions like those brought by Petitioners. See Galaviz-Medina v. Wooten, 27 F.3d 487, 491-92 (10th Cir.1994) (holding that district courts have jurisdiction over habeas petitions in which a petitioner in INS detention raises constitutional due process claims). Additionally, assuming, without deciding, that IIRIRA's transitional rules apply to Nguyen, the district court had jurisdiction over Nguyen's § 2241 habeas petition. See Jurado- Gutierrez v. Greene, 190 F.3d 1135, 1146 (10th Cir.1999) (holding that IIRIRA's transitional rules do not eliminate or alter traditional habeas review available under § 2241). Therefore, to the extent either the pre-IIRIRA provisions of the INA or the transitional provisions of IIRIRA apply, the district court had jurisdiction over the § 2241 habeas petitions filed by Ho and Nguyen.

[2] This court has never addressed the question of whether the permanent provisions of IIRIRA divest the federal courts of jurisdiction over § 2241 habeas petitions. Two permanent provisions may impact the cases at bar. INA § 242(g), as amended by IIRIRA § 306(a)(2) and codified at 8 U.S.C. § 1252(g), bars judicial review of the Attorney General's discretionary decisions to "commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. § 1252(g). Section 1252(g) applies "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings...." IIRIRA § 306(c)(1), Pub.L. No. 104- 208, 110 Stat. 3009, 3009-612. Therefore, notwithstanding the general, effective-date provision of IIRIRA, § 1252(g) applies to both Ho and Nguyen. The Supreme Court, however, has recently interpreted § 1252(g) to preclude judicial review of only the three discrete, discretionary acts specifically delineated in the statute. See Reno v. American-Arab Anti- Discrimination Comm., 525 U.S. 471, 119 S.Ct. 936, 943-45, 142 L.Ed.2d 940 (1999). Neither Ho nor Nguyen has asked this court to review the Attorney General's decision to commence proceedings against him, her decision to adjudicate his case, or her decision to execute the removal order. Thus, § 1252(g) does not preclude judicial review of either Petitioner's habeas petition. See Jurado-Gutierrez, 190 F.3d at 1144-45 (holding that § 1252(g) does not bar judicial review of § 2241 habeas petitions that challenge final removal orders); Parra v. Perryman, 172 F.3d 954, 957 (7th Cir.1999) (holding that the decision to continue to detain a removable alien does not implicate § 1252(g)).

[3] If applicable, 8 U.S.C. § 1252(a)(2)(B)(ii), a permanent provision added to the INA by IIRIRA § 306(a)(2), also significantly limits judicial review of immigration matters. Section 1252(a)(2)(B)(ii) provides:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review ... (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

Even if this permanent provision applies to Ho and/or Nguyen, a question this court does not decide, § 1252(a)(2)(B)(ii) does not bar judicial review of the issues before this court. Neither Ho nor Nguyen challenges one of the discretionary decisions made by the Attorney General for which judicial review is barred by § 1252(a)(2)(B)(ii). Cf. Van Dinh v. Reno, 197 F.3d 427, 434 (10th Cir.1999) (concluding that 8 U.S.C. § 1252(a)(2)(B)(ii) bars judicial review of the Attorney General's discretionary decision to transfer an alien from one correctional facility to another). Both Petitioners, instead, challenge the *1052 statutory and constitutional authority for their continued detention. Section 1252(a)(2)(B)(ii) bars judicial review of discretionary decisions. It does not bar judicial review of § 2241 habeas petitions, like those before this court, which challenge the validity and constitutionality of the statutes authorizing the continued detention of removable aliens. Cf. Parra, 172 F.3d at 957 (concluding that 8 U.S.C. § 1226(e) bars judicial review of "challenges to operational decisions, rather than to the legislation establishing the framework for those decisions."). [FN4] Petitioners' claims clearly fall outside the jurisdictional bars of § 1252(a)(2)(B)(ii) and § 1252(g) but squarely within 8 U.S.C. § 2241. Therefore, this court has jurisdiction.

FN4. In Parra v. Perryman, the Seventh Circuit Court of Appeals confronted the INS's argument that 8 U.S.C. § 1226(e), a statute similar to 8 U.S.C. § 1252(a)(2)(B)(ii), bars judicial review of § 2241 habeas petitions. See 172 F.3d 954, 957 (7th Cir.1999). Section 1226(e) states, "No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." The Seventh Circuit concluded that § 1226(e) did not divest the federal courts of jurisdiction over habeas petitions which included constitutional claims challenging the alien's continued detention. See Parra, 172 F.3d at 957. Arguably, however, § 1226(e) applies only to discretionary decisions made by the Attorney General pending the entry of a final removal order. See 8 U.S.C. § 1226(a) (1999) ("[A]n alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." (emphasis added)).

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B. Standard of Review

In their habeas petitions, both Ho and Nguyen argued the Attorney General does not have statutory authority to detain them indefinitely pending execution of the final order of removal. The district court did not directly address Petitioners' statutory argument, holding instead that their prolonged detention constituted unconstitutional incarceration. Neither district court Order identifies the statute governing the continued detention of Petitioners and, consequently, neither Order addresses the statutory argument raised in the two habeas petitions. Because the constitutional questions raised by Petitioners and directly addressed by the district court could only be reached if the district court first found that there is statutory authority for the continued detention of both Ho and Nguyen, this court will construe each district court ruling as including a determination that the governing statutes authorize the Attorney General to indefinitely detain Petitioners.

[4][5] The interpretation of a federal statute is a question of law which this court reviews de novo. See Utah v. Babbitt, 53 F.3d 1145, 1148 (10th Cir.1995). This court also conducts a de novo review of a district court's resolution of claims alleging constitutional violations by an agency. See Burke v. Board of Governors of the Federal Reserve System, 940 F.2d 1360, 1367 (10th Cir.1991).

C. Statutory Authority to Detain Indefinitely

1. No. 98-1333

As a prefatory matter, there is disagreement between the parties as to which statute governs the continued detention of Ho. The INS argues that the Attorney General's authority to continue to detain Ho arises under former 8 U.S.C. § 1226(e) (1994). Ho argues that the plain language of former § 1226 limits its application to the detention of aliens who are awaiting a final determination of excludability. Ho has received such a determination. Ho claims the only statute that authorizes the continued detention of an excludable alien after entry of a final order of exclusion is former 8 U.S.C. § 1227 (1994), [FN5] a statute *1053 nearly identical to the one interpreted by this court in Rodriguez-Fernandez and held to authorize detention only for a reasonable time in which to effectuate the deportation. See 654 F.2d at 1389.

FN5. During oral argument, Ho's counsel suggested that Ho's continued detention, like Nguyen's, is governed by the current version of 8 U.S.C. § 1231(a)(6). Assuming, without deciding, that 8 U.S.C. § 1231(a)(6) applies to Ho's continued detention, that statute, for the reasons discussed infra, expressly authorizes the Attorney General to indefinitely detain removable aliens, like Ho, who have been convicted of aggravated felonies.

In Rodriguez-Fernandez, this court addressed the question of whether the statutes in effect in 1981 authorized the Attorney General to indefinitely detain an excludable alien who could not be expeditiously deported. See 654 F.2d at 1384-85. Immigration officials allowed the alien, Rodriguez-Fernandez, to depart from the boat on which he had arrived in the United States and placed him into custody pending a determination of his eligibility to enter this country. See id. at 1384. After determining that Rodriguez-Fernandez was not clearly entitled to land, immigration officials continued to detain him pending an exclusion hearing. See id. Rodriguez-Fernandez was eventually ordered deported, but Cuba, his country of origin, refused to accept him. See id. Rodriguez-Fernandez, therefore, remained in INS detention. See id.

The Rodriguez-Fernandez majority reviewed the statutes which ostensibly authorized the Attorney General to detain an excludable alien both (1) prior

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to the determination of excludability and (2) after a final order of exclusion had been entered. See id. at 1389. The majority summarized the statutes governing detention pending a final order of exclusion as follows:

> Provisions relating to excludable aliens seeking entry ... provide for "temporary removal" from the transportation vehicle or vessel to a place of "detention, pending a decision on the aliens' eligibility to enter the United States and until they are either allowed to land or returned to the care of the transportation line or to the vessel or aircraft which brought them."

Id. (quoting 8 U.S.C. § 1223(b)).

The majority's analysis of the statutes governing the Attorney General's duties and authority following entry of a final order of exclusion included an analysis of former 8 U.S.C. § 1227. See id. at 1389-90. Former § 1227 instructed the Attorney General to immediately effectuate the excludable alien's deportation, "unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper." 8 U.S.C. § 1227(a)(1) (1961).

In an effort to avoid what it believed were problematic constitutional questions, the Rodriguez-Fernandez majority refused to construe former § 1227 to permit the Attorney General to indefinitely detain an excludable alien whose deportation could not be expeditiously accomplished. See 654 F.2d at 1389-90. The majority concluded that the applicable statutes, including former 8 U.S.C. § 1227, authorized the Attorney General to detain excludable aliens only "during proceedings to determine eligibility to enter and, thereafter, during a reasonable period of negotiations for their return to the country of origin or to the transporter that brought them here." Id. at 1389.

After Rodriguez-Fernandez, but before the sweeping changes wrought by IIRIRA, the INA was amended several times. As a result of one of these amendments, a new section, 8 U.S.C. § 1226(e), was added in 1990. See Pub.L. No. 101-649, 104 Stat. 4978, 5050 (1990). It is this statutory provision which the INS argues governs the continued detention of Petitioner Ho. Former 8 U.S.C. § 1226(e) provided:

> (e) Custody of alien
> (1) Pending a determination of excludability, the Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction.
> (2) Notwithstanding any other provision of this section, the Attorney General shall not release such felon from custody unless the Attorney General determines that the alien may not be deported because the condition described in section 1253(g) of this title exists.
> *1054 (3) If the determination described in paragraph (2) has been made, the Attorney General may release such alien only after--
> (A) a procedure for review of each request for relief under this subsection has been established,
> (B) such procedure includes consideration of the severity of the felony committed by the alien, and
> (C) the review concludes that the alien will not pose a danger to the safety of other persons or to property.

8 U.S.C. § 1226(e) (1991).

Ho contends that former § 1226(e) governs the continued detention of excludable aliens who have been convicted of aggravated felonies [FN6] only during the period of time prior to the entry of a final determination of excludability. Because a final order of exclusion has been entered against him, Ho argues that the Attorney General has no authority under former § 1226(e) to continue to detain him. He contends his continued detention is governed solely by former 8 U.S.C. § 1227 (1994), a statute essentially identical to that found by this court in Rodriguez-Fernandez to not authorize indefinite detention after entry of a final order of exclusion. This court must, as a threshold matter, resolve the question whether former 8 U.S.C. § 1226(e) governs the continued detention of excludable aliens who have been convicted of aggravated felonies and who have received final orders of exclusion. Because we answer that question in the affirmative, we must then determine whether former § 1226(e) confers on the Attorney General a power this court has concluded she does not have under former 8 U.S.C. § 1227, i.e., the authority to indefinitely detain an excludable alien who has been convicted of an aggravated felony and who cannot be deported within a reasonable amount of time.

> FN6. Ho was convicted of an aggravated felony. See 8 U.S.C. § 1101(a)(43)(G) (1994).

Both the Ninth and Fifth Circuit Courts of Appeal

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have interpreted former 8 U.S.C. § 1226(e) to authorize the Attorney General to continue to detain an excludable alien after a final exclusion order has been entered. See Gisbert v. United States Attorney General, 988 F.2d 1437, 1446 (5th Cir.1993); Alvarez-Mendez v. Stock, 941 F.2d 956, 962 (9th Cir.1991). In what was then a case of first impression, the Ninth Circuit analyzed both former § 1226(e) and former 8 U.S.C. § 1252(a)(2) (1994), the statute that governed the continued detention of deportable aliens. [FN7] See Alvarez- Mendez, 941 F.2d at 961. The Ninth Circuit concluded that former § 1252(a)(2) required the Attorney General to continue to detain a deportable alien who had been convicted of an aggravated felony both before and after entry of the final determination of deportability. See id. That court then specifically rejected the interpretation of § 1226(e) advanced by Ho, concluding that such an interpretation would result in an "irrational distinction" between excludable and deportable aliens; the Attorney General would be required to detain deportable aliens convicted of aggravated felonies both before and after a final determination of deportability but would be required to release excludable aliens who had been convicted of an aggravated felony after entry of the final order of exclusion. See id.

> FN7. Before the enactment of IIRIRA, aliens ineligible for admission into the United States were designated "excludable" aliens. See 8 U.S.C. § 1182 (1994). These individuals are now referred to as "inadmissible" aliens. See 8 U.S.C. § 1182. Aliens who had gained admission into the United States were designated "deportable" aliens. See 8 U.S.C. § 1251 (1994). Proceedings to remove both inadmissible and deportable aliens are now referred to as "removal proceedings." See 8 U.S.C. § 1229a. Under the prior version of the INA, Petitioner Ho was an excludable alien and Petitioner Nguyen was a deportable alien.

In the case of a dangerous alien subject to exclusion proceedings, however, [petitioner] interprets sections 1226 and 1227 to require the Attorney General to detain *1055 the alien while exclusion proceedings are pending, but to release him once a final order of exclusion is entered, unless the Attorney General can effect the alien's removal immediately. Not only would this distinction undermine Congress' attempt to protect society from dangerous aliens, it would be contrary to accepted tenets of U.S. immigration law, which treat aliens subject to deportation more favorably than those seeking initial admission.

The only logical interpretation of section 1226(e) is that it both requires the Attorney General to detain aliens convicted of aggravated felonies pending a determination of their excludability, and provides that where deportation of an alien found excludable cannot be immediate, the Attorney General may release [the alien] only if doing so will not endanger society.

Id. at 961-62 (footnote omitted).

[6] We find the reasoning in Alvarez-Mendez persuasive and now join the Ninth and Fifth Circuits in interpreting former 8 U.S.C. § 1226(e) to authorize the Attorney General to continue to detain an excludable alien who has been convicted of an aggravated felony after the entry of a final order of exclusion.

Former § 1226(e) is not ambiguous concerning the Attorney General's discretion to indefinitely detain an excludable alien whose deportation cannot be expeditiously accomplished. The statute is framed not as a grant of authority to detain the alien, but as a limitation on the Attorney General's power to release the alien from detention. If the alien cannot be deported because his country of origin refuses to accept him, the statute expressly prohibits the Attorney General from releasing the alien unless, upon review of the alien's request for relief, it is determined that the alien "will not pose a danger to the safety of other persons or to property." 8 U.S.C. § 1226(e) (1994). The statute imposes no time limit on its restriction of the Attorney General's power to release the alien and this court will not read a time limit into the statute. Cf. Pueblo of San Ildefonso v. Ridlon, 103 F.3d 936, 939 (10th Cir.1996) ("Where statutory language is clear and unambiguous, that language is controlling and courts should not add to that language.").

[7] The statutory scheme analyzed by this court in Rodriguez-Fernandez did not include former 8 U.S.C. § 1226(e), the statute applicable to the case at bar. The most reasonable interpretation of former § 1226(e) compels the conclusion that the Attorney General must continue to detain, after entry of a final order of exclusion, an excludable alien who has been convicted of an aggravated felony unless a review of the alien's request for relief concludes that the alien does not pose a danger to the safety of

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other persons or to property. Ho is an excludable alien who has been convicted of an aggravated felony. Acting on Ho's request for relief from continued incarceration, the Attorney General has concluded that Ho poses a danger to the safety of other persons or to property, a determination not challenged by Ho and thus not addressed herein. Pursuant to former § 1226(e), therefore, the Attorney General may not release Ho from detention and is statutorily obligated to continue to detain him indefinitely.

2. No. 99-1182

The INS maintains that the question of Nguyen's continued detention is governed by 8 U.S.C. § 1231(a)(6) and Nguyen does not dispute this position. This court will, therefore, analyze Nguyen's statutory claims under § 1231(a)(6). [FN8]

FN8. 8 U.S.C. § 1231(a)(6) was added to the INA by IIRIRA § 305(a)(3). Arguably, 8 U.S.C. § 1252 (1994), the statute in effect at the time deportation proceedings were commenced against Nguyen may govern Nguyen's continued detention. But see Zadvydas v. Underdown, 185 F.3d 279, 287 & 286 n. 7 (5th Cir.1999) (determining that the effective-date provision of IIRIRA is ambiguous and concluding that IIRIRA applies to aliens who had received final removal orders before IIRIRA's effective date). Former § 1252(a)(2)(B) was added to the Code in 1991 and provided:

The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

8 U.S.C. § 1252(a)(2)(B) (1994).

By its express terms, this statute applies to aliens like petitioner, Nguyen, who were formerly classified as "deportable." See id.; see also Gisbert v. United States Attorney General, 988 F.2d 1437, 1445 (5th Cir.1993) (concluding that former 8 U.S.C. § 1252(a)(2)(B) allows the Attorney General to indefinitely detain deportable aliens). Additionally, Nguyen was convicted of an aggravated felony. See 8 U.S.C. § 1101(a)(43)(G) (1996). Arguably, former § 1252(a)(2)(B) requires the Attorney General to indefinitely detain a deportable alien convicted of an aggravated felony who cannot demonstrate he is not a threat to society or likely to abscond. Because neither party has raised the issue, however, we do not decide whether this statute governs Nguyen's continued detention or whether the permanent provisions of IIRIRA apply to aliens who received final removal orders before IIRIRA's effective date.

***1056** Pursuant to 8 U.S.C. § 1231(a)(1)(A), once an alien is ordered removed, the Attorney General "shall remove the alien from the United States within a period of 90 days." This ninety-day period is referred to in the statute as the "removal period." See 8 U.S.C. § 1231(a)(1). Although the statute contains the ostensibly unequivocal language "shall remove," it begins with the qualifying language, "[e]xcept as otherwise provided in this section." Id. The statute, thus, expressly contemplates that the Attorney General may be unable to remove certain aliens within the removal period. At least one qualifying provision referenced in § 1231(a)(1)(A) is found at 8 U.S.C. § 1231(a)(6). Specifically, § 1231(a)(6) provides:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney general to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(6).

[8] The INS asserts that § 1231(a)(6) is unambiguous and confers on the Attorney General the statutory authority to indefinitely detain an alien who cannot be removed during the removal period if that alien has been found to be a risk to the community or unlikely to comply with the removal order. Nguyen, however, argues that § 1231(a)(6) is ambiguous and no more authorizes indefinite detention than the statute interpreted by this court in Rodriguez-Fernandez.

Nguyen's contention that 8 U.S.C. § 1231(a)(6) is indistinguishable from the statute interpreted by this court in Rodriguez-Fernandez is without merit. Unlike the ambiguous statute analyzed in Rodriguez-Fernandez, § 1231(a)(6) is not ambiguous. It expressly allows the Attorney General, in her discretion, to continue to detain the following removable aliens beyond the ninety-day removal period: (1) those who are inadmissible under 8 U.S.C. § 1182; (2) those who are removable under 8 U.S.C. § 1227(a)(1)(C), § 1227(a)(2), or § 1227(a)(4); and (3) those who she determines would be a flight risk or a risk to the community if released. See 18 U.S.C. § 1231(a)(6); accord Chi Thon Ngo v. Immigration & Naturalization Serv., 192 F.3d 390, 394-95 (3rd Cir.1999).

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Nguyen was convicted of an aggravated felony and, therefore, is removable under 8 U.S.C. § 1227(a)(2). See 8 U.S.C. § 1101(a)(43)(G). Additionally, the Attorney General has determined that Nguyen is a risk to the community and unlikely to comply with the order of removal if released from incarceration. Nguyen does not challenge the Attorney General's determination that he would be a flight risk ***1057** or a risk to the community if he were released from incarceration and this court thus does not address the issue. Consequently, the statute clearly and unambiguously authorizes the Attorney General to detain Nguyen beyond the ninety-day removal period.

[9] Section 1231(a) places no time limit on the continued detention of the aliens whose continued detention it authorizes. Although Nguyen argues this panel must follow the Rodriguez-Fernandez majority and read a reasonable time limit into the statute, that argument is also without merit. In Rodriguez-Fernandez, the majority interpreted an ambiguous statute to authorize the continued detention of an excludable alien only "during a reasonable period of negotiations for [his] return to [his] country of origin...." 654 F.2d at 1389. Because the statute analyzed in Rodriguez-Fernandez was ambiguous, the majority's imposition of a reasonable time limit on continued detention was an essential component of its interpretation of the statute. In stark contrast, 8 U.S.C. § 1231(a)(6) expressly allows for continued detention beyond the removal period with no time limit placed on the duration of such detention. This court will not substitute its judgment for that of Congress by reading into the statute a time limit that is not included in the plain language of the statute. Cf. Pueblo of San Ildefonso, 103 F.3d at 939 ("Where statutory language is clear and unambiguous, that language is controlling and courts should not add to that language."). The unambiguous language of 8 U.S.C. § 1231(a)(6) and the absence of an express time limit on the Attorney General's authority to continue to detain leads this court to conclude that Congress intended to and expressly did authorize the Attorney General to indefinitely detain certain removable aliens, Nguyen among them, who cannot be removed within the ninety-day removal period. Accord Chi Thon Ngo, 192 F.3d at 394-95.

D. Constitutionality of Indefinite Detention

[10] Because the applicable statutes allow the Attorney General to indefinitely detain both Ho and Nguyen, it is necessary for this court to address the question of whether such indefinite detention is unconstitutional. Petitioners argue this court is bound by the constitutional analysis in Rodriguez-Fernandez. This argument is unpersuasive. This court's conclusion in Rodriguez-Fernandez that the statute in effect at the time did not authorize indefinite detention was influenced by the majority's belief that any other reading of the statute would raise significant constitutional problems. See Rodriguez-Fernandez, 654 F.2d at 1386. "We dispose of the appeal by construing the applicable statutes to require [petitioner's] release at this time. Nevertheless, it seems important to discuss the serious constitutional questions involved if the statute were construed differently." Id.; see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) (reiterating that "it is beyond debate" that courts must construe statutes to avoid constitutional problems unless such construction is plainly contrary to Congress' intent). The Rodriguez-Fernandez majority, however, did not purport to definitively answer the constitutional questions raised; its statutory interpretation was aided, not compelled, by its constitutional analysis. The majority held that the statute did not authorize indefinite detention. See 654 F.2d at 1389-90. It did not hold that indefinite detention is unconstitutional. Thus, any discussion of the constitutionality of indefinite detention in Rodriguez-Fernandez is dicta and is not binding on this panel. See Bates v. Dep't of Corrections, 81 F.3d 1008, 1011 (10th Cir.1996) ("[A] panel of this Court is bound by a holding of a prior panel of this Court but is not bound by a prior panel's dicta.").

[11][12][13][14][15][16] The Due Process Clause of the Fifth Amendment provides, in pertinent, ***1058** part that "[n]o person shall ... be deprived of ... liberty ... without due process of law." U.S. Const. Amend. V. The due process protection of the Fifth Amendment has two components, a substantive

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due process component and a procedural due process component. See United States v. Salerno, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The substantive due process component precludes the government from engaging in conduct that "shocks the conscience" or interferes with rights "implicit in the concept of ordered liberty." Id. (citations and quotations omitted). The procedural due process component precludes the government from depriving a person of life, liberty, or property in an unfair manner. See Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Substantive and procedural due process claims must be supported by an underlying liberty interest. See Fristoe v. Thompson, 144 F.3d 627, 630 (10th Cir.1998). A liberty interest can arise in one of two ways: (1) from the Due Process Clause itself; or (2) from a state or federal statute. See id. Any due process analysis must begin with a "careful description of the asserted right." Reno v. Flores, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

Petitioners do not challenge the Attorney General's power to deport them or her power to detain them for a reasonable time until they can be physically removed from this country. Petitioners, instead, claim that because their country of origin refuses to accept them, their continued detention is indefinite, and possibly permanent and thus constitutes punishment without a criminal trial. Petitioners assert that they have a liberty interest, arising from the Due Process Clause itself, in being free from this type of incarceration. Petitioners, however, fundamentally mischaracterize the true nature of the right they are asserting.

Petitioners are subject to final removal orders and the only step in the removal process remaining to be accomplished is the execution of the removal orders effectuating Petitioners' physical expulsion from this country. Any right either Petitioner had to remain in this country was extinguished when their removal orders became final. See 8 U.S.C. § 1101(a)(20); 8 C.F.R. § 1.1(p) (1999) ("The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion or deportation.")

If their habeas petitions are granted, Petitioners will be awarded the very right denied them as a result of the final orders of removal, i.e., the right to be at large in the United States. Although the petitions could be characterized as requests to be released from incarceration, the relief they seek is indistinguishable from a request to be readmitted to this country, albeit temporarily, until their return to Vietnam can be effectuated. The purported liberty interests at stake in these cases, therefore, are most appropriately viewed from the perspective of an alien who has sought but been denied initial entry into this country and who is subject to indeterminate detention because his country of origin will not accept his return.

[17][18][19] It is well-settled that aliens who are physically present in this country but who are not lawful permanent residents are entitled to some of the protections afforded by the Fifth Amendment. See Plyler v. Doe, 457 U.S. 202, 210, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."). The Supreme Court, however, "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or *1059 exclude aliens is a sovereign prerogative." Landon v. Plasencia, 459 U.S. 21, 32, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982); see also United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544, 70 S.Ct. 309, 94 L.Ed. 317 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). Although Petitioners have been continually present in this country since they were admitted as refugees, physical presence alone does not confer heightened constitutional rights on an alien seeking admission to this country. See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 213, 73 S.Ct. 625, 97 L.Ed. 956 (1953). Consequently, while aliens physically present in the United States are clearly "persons" afforded some Fifth Amendment rights, they have no constitutional rights regarding their application for admission.

[20] Petitioners have been ordered deported and those orders are final. The final removal orders

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stripped both Ho and Nguyen of any heightened constitutional status either may have possessed prior to the entry of the final removal order. Like an alien seeking initial entry, Petitioners have no right to be at large in the United States. As a consequence of their final removal orders, and notwithstanding their physical presence in this country, Ho and Nguyen have no greater constitutional rights with respect to their applications for admission than an alien seeking to enter this country for the first time. Cf. id. ("For purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws.").

Nguyen, however, argues that he possesses greater constitutional rights than excludable aliens because of his former status as a lawful permanent resident. Nguyen's argument was recently considered and rejected by the Fifth Circuit Court of Appeals. See Zadvydas, 185 F.3d at 294-97. Acknowledging that a resident alien is entitled to greater procedural due process rights during removal proceedings than those accorded excludable aliens, that court nevertheless concluded that once a removal order has become final and the only act remaining to be carried out is the actual expulsion of the alien, no distinction exists between the constitutional rights of former resident aliens and those of excludable aliens. See id. The Fifth Circuit analyzed several Supreme Court cases and concluded, "Nothing in these cases suggests that a resident alien has a broadly privileged constitutional status relative to excludable aliens, or is constitutionally entitled to more favorable treatment when both the right asserted and the governmental interest are identical to those in the parallel case of an excludable alien." Id. The Fifth Circuit could find no distinction between the right to release from continued incarceration asserted by a deportable alien subject to continued detention pending deportation and the same right asserted by an excludable alien subject to the same continued detention. See id. at 295-96. Further, that court found no distinction between the government's interest in expelling a deportable alien and its interest in expelling an excludable alien. See id. at 296.

[21] We have found no case, and none was brought to our attention by Nguyen, in which either the Supreme Court or a court of appeals has held that a deportable alien subject to a final order of deportation and being detained by the United States pending that deportation possesses greater constitutional rights than an excludable alien in the same position. The Fifth Circuit's analysis was comprehensive and we find it persuasive. We conclude that once a removal order has become final and an alien who was formerly a lawful permanent resident seeks temporary re-entry into the United States, the alien possesses identical constitutional rights with respect to his *1060 application for admission as an excludable alien.

Both Petitioners are properly characterized as inadmissible aliens seeking temporary entry into the United States. Notwithstanding their physical presence in this country, they have no constitutional rights regarding their application for entry. See Plasencia, 459 U.S. at 32, 103 S.Ct. 321. Hence, the Due Process Clause does not provide Petitioners a liberty interest in the right they assert, i.e., the right to be temporarily admitted into this country. Furthermore, Petitioners do not contend the statutes that authorize their continued detention or any other existing state or federal law or regulation creates a liberty interest in being temporarily admitted into the United States. [FN9]

FN9. Even if Petitioners had argued that either former 8 U.S.C. § 1226(e) (1994), 8 U.S.C. § 1231(a)(6) or some other law or regulation created such a liberty interest because it allows the Attorney General to release them from detention if she determines that they are no longer a flight risk or a risk to society, it is unclear whether such a law or regulation would create a liberty interest. See Olim v. Wakinekona, 461 U.S. 238, 249, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983) (holding that no liberty interest is created by a statute that allows the decision-maker to deny the requested relief with unfettered discretion); Velasco- Gutierrez v. Crossland, 732 F.2d 792, 797 (10th Cir.1984) (holding that no liberty interest was created by INS internal operations instructions); 8 U.S.C. § 1252(a)(2)(B)(ii) (barring judicial review of the Attorney General's discretionary decisions).

Petitioners have not demonstrated that they have a liberty interest in the temporary entry they seek arising either under the Due Process Clause or from a state or federal statute or regulation. Accordingly, Petitioners' substantive and procedural due process

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claims fail. See Fristoe, 144 F.3d at 630.

III. CONCLUSION

The applicable statutes authorize the continued, indefinite detention of both Petitioners. Because Petitioners have no liberty interest in the right they are asserting, their due process claims fail. Consequently, there is no constitutional impediment to Petitioners' continued detention. The judgment of the district court in No. 98-1333 is reversed and the case is remanded to the district court with instructions to revoke Petitioner Ho's bond and for any further proceedings consistent with this opinion. The judgment of the district court in No. 99-1182 is reversed and the case remanded to the district court with instructions to revoke Petitioner Nguyen's bond and for any further proceedings consistent with this opinion. The mandate shall issue forthwith.

BRORBY, Circuit Judge, dissenting.

I agree with the majority's well-reasoned resolution of the threshold jurisdictional issue. I further agree the plain language of the applicable statutes, former 8 U.S.C. § 1226(e) (1994) and current 8 U.S.C. § 1231(a)(6), authorizes the Attorney General to detain Petitioners indefinitely pending execution of the final removal order. I must depart from the majority's analysis at that point, however, because the indefinite detention of Petitioners Ho and Nguyen may well violate the substantive due process rights I believe the Fifth Amendment of the United States Constitution affords them, in a manner that shocks the conscience. For that reason, I would remand this matter to the district court for additional factual findings in accordance with the analysis presented below.

The majority avoid the crucial constitutional issue this case presents by preemptively concluding that Petitioners "fundamentally mischaracterize the true nature of the right they are asserting." According to the majority, "[b]oth Petitioners are properly characterized as inadmissible aliens seeking temporary entry into the United States." As shown below, it is the majority, not the Petitioners, who mischaracterize *1061 the fundamental rights at stake in this case.

Petitioners plainly assert that their continued, indefinite detention pending removal amounts to impermissible punishment and therefore violates the liberty rights they have as "persons" protected under the Due Process Clause of the Fifth Amendment to the United States Constitution. The majority disregard this claim, reasoning, without the support of authority, that "[t]he final removal orders stripped both Ho and Nguyen of any heightened constitutional status either may have possessed prior to the entry of the final removal order." On that basis, the majority conclude "[t]he purported liberty interests at stake in these cases ... are most appropriately viewed from the perspective of an alien who has sought but been denied initial entry into this country and who is subject to indeterminate detention because his country of origin will not accept his return." Narrowing its analysis to the perspective of an alien seeking initial admission to the United States, the majority permits our government to detain Petitioners indefinitely, even permanently, with no constitutional recourse (" 'an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application' " (quoting Landon v. Plasencia, 459 U.S. 21, 32, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982))).

Close analysis reveals that the majority's treatment of Petitioners' constitutional claims is supported only by a tenuous foundation of legal fiction stacked upon legal fiction. In order to characterize Petitioners as aliens seeking admission, the majority must first equate the removal order itself with an actual physical exit from the country. Having made that leap, the majority adopt the "entry fiction" applied in admission cases so as to characterize immigrants who are physically present within United States borders pending a determination of admission as never having effected entry into this country and therefore not entitled to due process protection. See Plasencia, 459 U.S. at 32-33, 103 S.Ct. 321. Compounding these fictions is the majority's unsupported conclusion that while Petitioners resided in the United States they may have enjoyed some form of "heightened" constitutional status that could be stripped away upon the issuance of a removal order. Finally, to avoid the constitutional prohibition against imprisonment for purposes other than punishment, the majority employs the fiction that detention is merely an extension of the exclusion proceedings, and therefore within the plenary power of the executive and legislative branches to govern immigration matters.

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In my view, this fictional foundation the majority construct as a barrier to Petitioners' constitutional claims collapses under the ground floor constitutional principal that "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." Plyler v. Doe, 457 U.S. 202, 210, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); see also, Plasencia, 459 U.S. at 32, 103 S.Ct. 321 ("[o]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly"); Rodriguez-Fernandez, 654 F.2d at 1387-88 (" 'There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as a punishment for crime.' " (quoting Petition of Brooks, 5 F.2d 238, 239 (D.Mass.1925))). Petitioners entered the United States as refugees in the 1980s and have lived in this country for over fifteen years. They have not exited the country and do not seek entry or readmission, temporary or otherwise. Thus, regardless of their status under the removal orders, in the most real *1062 sense Petitioners continue to be "persons" who enjoy basic constitutional rights.

Liberty is one of those basic rights enjoyed by all "persons," as "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause." Foucha v. Louisiana, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). Any infringement of this right, in the absence of incarceration pending trial or other disposition of a criminal charge (i.e., punishment), is subject to strict scrutiny--the infringement must be "narrowly tailored to serve a compelling state interest." [FN1] See Reno v. Flores, 507 U.S. 292, 301-02, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); United States v. Salerno, 481 U.S. 739, 747, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The appropriate strict scrutiny analysis is set forth in Salerno, which instructs that we must first determine whether the detention is intended as punishment or for a legitimate regulatory purpose. If the detention is intended as legitimate regulation, we must determine whether it is "excessive in relation to the regulatory purpose Congress sought to achieve." 481 U.S. at 747-48, 107 S.Ct. 2095.

FN1. I agree with the District Court for the Western District of Washington in its rejection of the government's argument that because the legislative and executive branches possess "plenary power" over immigration and naturalization, see Flores, 507 U.S. at 305-06, 113 S.Ct. 1439, courts should apply a more deferential standard of review. As that court noted:

> While the plenary power doctrine supports judicial deference to the legislative and executive branches on substantive immigration matters, such deference does not extend to post-deportation order detention. Indefinite detention of aliens ordered deported is not a matter of immigration policy; it is only a means by which the government implements Congress's directives. The dangers at which the detention scheme is directed, chiefly the prevention of flight and the protection of the community pending deportation of aliens who have been convicted of crimes, involve domestic interests rather than international concerns.

Phan v. Reno, 56 F.Supp.2d 1149, 1155 (W.D.Wash.1999).

The answer to the first question is clear. No one asserts Petitioners are being detained as punishment. Each has served his sentence(s) for the crime(s) committed. Furthermore, deportation and immigration detention are not considered punishment. See INS v. Lopez-Mendoza, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984); Zadvydas, 185 F.3d at 296; Phan, 56 F.Supp.2d at 1155 n. 7. We are therefore left to determine what regulatory purpose is being served and whether the detention is excessive in relation to that purpose.

As a number of district courts dealing with this difficult issue in the first instance have recognized, the critical inquiry in these cases is whether an alien's detention is excessive in relation to the government's legitimate regulatory interest in (1) ensuring the safe removal of aliens ordered deported; (2) preventing flight prior to deportation; and (3) protecting the public from dangerous felons. See Vo v. Greene, 63 F.Supp.2d 1278, 1282-83 (D.Colo.1999); Phan, 56 F.Supp.2d at 1155-56; Hermanowski v. Farquharson, 39 F.Supp.2d 148, 159 (D.R.I.1999); see also 8 U.S.C. § 1231(a)(6). In evaluating the scope of the detention in relation to the government's regulatory interest,

> we must necessarily balance the likelihood that the government will be able to effectuate deportation,

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against the dangerousness of a petitioner and the likelihood that he will abscond if released. In so doing, it becomes clear that as the probability that the government can actually deport an alien decreases, the government's interest in detaining that alien becomes less compelling and the invasion into the alien's liberty more severe. Dangerousness and flight risk are thus permissible considerations and may, in certain situations, warrant continued detention, but only if there is a realistic chance that an alien will be deported. Detention by the INS can be lawful only in aid of deportation. Thus, *1063 it is "excessive" to detain an alien indefinitely if deportation will never occur.
Phan, 56 F.Supp.2d at 1156. [FN2]

FN2. This circuit and others have used similar balancing frameworks when reviewing other types of administrative detention. See, e.g., United States v. Theron, 782 F.2d 1510 (10th Cir.1986); United States v. Hare, 873 F.2d 796 (5th Cir.1989); United States v. Gelfuso, 838 F.2d 358 (9th Cir.1988).

Because I do not accept the premise that Petitioners have no liberty rights at stake, I would apply this balancing framework to evaluate each Petitioner's substantive due process claim. [FN3] The likelihood of deportation, dangerousness and the likelihood of flight clearly are factual inquiries unique to each case. The district court did not undertake such an inquiry, but instead relied on this court's decision in Rodriguez-Fernandez to grant the writs. As the majority point out, Rodriguez-Fernandez does not strictly control this case. Consequently, I would remand these matters to the district court to apply the balancing framework in the first instance, considering all facts relevant to evaluating the scope of detention in relation to the government's legitimate regulatory purpose.

FN3. I agree with that portion of the majority's and Fifth Circuit's analysis that concludes there is no difference, under the circumstances presented here, between the right to release from continued incarceration asserted by an excludable versus a deportable alien, see Maj. Slip Op. at ---- - ----; Zadvydas, 185 F.3d at 294-96. Mr. Ho and Mr. Nguyen assert the same fundamental constitutional right, and the government's interest in removing each is the same. See Zadvydas, 185 F.3d at 295. Courts which have found the distinction between deportable and excludable aliens relevant in this context, see Vo, 63 F.Supp.2d at 1282-83; Phan, 56 F.Supp.2d at 1153-54; Hermanowski, 39 F.Supp.2d at 157-58, appear to have done so as a means to avoid application of the entry fiction doctrine to deny constitutional rights to deportable aliens (i.e., aliens who once were lawful permanent residents). The strict scrutiny analysis I propose would eliminate the need for such a distinction in order to protect the constitutional rights of aliens who the United States government is unable to deport.

In sum, I emphasize that the sovereign power of the political branches of government to detain and remove aliens simply is not without limit--it must not run afoul of the Fifth Amendment's guarantee that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The substantive component of this due process guarantee protects against governmental interference with those rights "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 324-25, 58 S.Ct. 149, 82 L.Ed. 288 (1937), and prohibits governmental conduct that "shocks the conscience." Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952). The majority cannot dispute that Petitioners Ho and Nguyen were "persons" under the Constitution for over fifteen years. Ordered liberty does not allow for the use of legal fictions to strip any human being of his status as a "person" under the United States Constitution in order to justify indefinite imprisonment pending completion of the regulatory process of removal. Governmental conduct that so reduces an individual to a "non-person" to permit such imprisonment without any attempt to scrutinize the scope of the detention by balancing the likelihood that the government will be able to effectuate deportation against a petitioner's dangerousness and the likelihood that he will abscond if released most assuredly shocks my conscience. I therefore dissent.

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IN THE SUPREME COURT OF THE UNITED STATES

KESTUTIS ZADVYDAS, PETITIONER

v.

LYNNE UNDERDOWN AND
IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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Pursuant to Rule 15.8 of the Rules of this Court, the Solicitor General, on behalf of the respondents, respectfully submits this supplemental brief.

1. This case involves the constitutionality of the Attorney General's discretionary decision, exercised through her delegate, the Immigration and Naturalization Service (INS), to detain respondent pursuant to 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The Fifth Circuit held that the Attorney General's continued detention, under 8 U.S.C. 1231(a)(6) (Supp. IV 1998), of an alien who is subject to a final order of removal and has been determined by the Attorney General to pose a threat of danger or flight if released, is constitutional. 185 F.3d 279 (2000). That the government may

not be able to immediately effectuate the alien's removal did not alter that result, in the court's view, and the court pointed out that petitioner's detention was not properly characterized as permanent because of the regulatory procedures for automatic, periodic administrative review. Id. at 291. The court also found that it would be premature to conclude that petitioner would never be removed. It concluded that, "[g]iven the traditional deference we show to the other branches in matters of immigration policy, judicial intrusion should not be considered, particularly where there are reasonable avenues for parole, until there is a more definitive showing that deportation is impossible, not merely problematical, difficult, and distant." Id. at 294.

2. a. The petition for a writ of certiorari to review the Fifth Circuit's judgment was filed on January 11, 2000, requesting, inter alia, that a ruling on the petition "be deferred for a reasonable period to allow the Ninth Circuit to decide Kim Ho Ma [v. Reno]," and arguing that, if the Ninth Circuit ruled in favor of the alien, a split in the circuits would result warranting this Court's review. Pet. 6. The petition also contended that, regardless of the outcome in Ma, the Court should grant review in the instant case because the court of appeals' decision, in petitioner's view, is incorrect. Pet. 6-28.

On April 17, 2000, petitioner filed a supplemental brief bringing to the Court's attention the Ninth Circuit's April 10, 2000, decision in Ma v. Reno, 208 F.3d 825, explaining that the Ma decision conflicts with the Tenth Circuit's February 29, 2000,

decision in Ho v. Greene, 204 F.3d 1045, and contending that the Ma decision conflicts with the decision in the instant case on constitutional grounds. Pet. Supp. Br. 3-6.

b. The government filed a brief in opposition in this case on May 15, 2000. In that brief, we explained (at 15-16) that the decision of the Tenth Circuit in Ho, which was issued subsequent to the filing of the instant petition, is in accord with the decision below. We also pointed out (at 16) that the result in this case is inconsistent with the result reached by the Ninth Circuit in Ma. We nevertheless opposed review in this case at that time because no court of appeals had reached a contrary result on the constitutional issue, the court of appeals had not addressed (and petitioner did not present to this Court) the statutory argument on which the Ma court relied, and review by the Court of the constitutional issue in this case would be premature in light of the conflicting rulings by the Ninth and Tenth Circuits on the antecedent question of statutory interpretation, which the government had sought to eliminate by filing a petition for rehearing en banc in Ma. Br. in Opp. 16-18.

c. On May 24, 2000, petitioner filed a reply brief, acknowledging (at 3-4) that the statutory issue should be resolved before reaching the constitutional question presented by this petition. Petitioner contended, however, that the statutory issue could be addressed in this case because it is a necessary predicate to the constitutional questions presented.

d. By letter dated June 9, 2000, the Solicitor General informed the Court that the government's petition for rehearing en banc in Ma was denied on June 2, 2000, and that he had expedited consideration of whether to file a petition for a writ of certiorari in that case. He also informed the Court that the alien's petition for rehearing en banc in Ho was denied on June 2, 2000.

By letter dated June 20, 2000, the Solicitor General informed the Court that he had authorized the filing of a petition for a writ of certiorari in Ma, which we had cited in our brief in opposition as conflicting with the result in the instant case. By letter dated June 26, 2000, petitioner asserted that the court of appeals in this case had implicitly ruled on the statutory question on which Ma relied, that it had been raised and briefed by petitioner in a post-argument supplemental brief below, and that, in any event, the Court should grant review in this case because the statutory issue has the same bearing on this case as on Ma.

3. On July 5, 2000, the Solicitor General filed a petition for a writ of certiorari in Ma. Reno v. Ma, No. 00-38. On August 31, 2000, the respondent in that case filed a brief in opposition. Simultaneously with our filing of this supplemental brief, we are filing our reply brief in Ma, urging the Court to grant certiorari in that case as well as this one.

4. We have now concluded -- in light of the denial of rehearing en banc in Ma, the subsequent filing of our certiorari petition in that case, and the respondent's brief in opposition to

that petition -- that the Court should grant certiorari in this case as well as in Ma. In his brief in opposition in Ma, the respondent places central reliance on the argument that the Ninth Circuit's statutory interpretation is supported by the doctrine that statutes should be interpreted in a manner that avoids a serious constitutional question. See 00-38 Br. in Opp. i, 3, 11, 14, 18-19, 26, 31-32. Because the constitutional arguments that the Ma respondent relies upon in defense of the Ninth Circuit's statutory ruling were rejected by the Fifth Circuit in this case, we believe that it would be appropriate for the Court to grant certiorari in this case and in Ma to resolve both the statutory and the constitutional challenges to detention under Section 1231(a)(6) at the same time.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari in this case and in Ma v. Reno, No. 00-38, and consolidate the two cases for oral argument.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

SEPTEMBER 2000

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No. 99-7791

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Petitioner,

versus

LYNNE UNDERDOWN and
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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Certiorari Granted October 10, 2000

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10/11/96 [22] Transcript of evidentiary hrg held bfr Mag Moore on 9/27/96 (bb) [Entry date 10/16/96]

5/14/97 [43] PROCEEDING: court reporter Vic DiGiorgio; pla's motion to review Mag's Report and Recommendation [27-1] is submitted by Judge Eldon E. Fallon (ps) [Entry date 05/19/97]

10/30/97 [44] ORDER that pla's application for writ of h/c is granted; further ordered that pla shall be released from custody of the INS upon conditions to be set by the court at a hearing on 11/12/97 at 9:00; further ordered that pla be released w/in 35 days of the hrg by Judge Eldon E. Fallon (bb) [Entry date 10/30/97] [Edit date 10/30/97]

11/21/97 [52] PROCEEDING: Reported/Recorded by Liz Spong; ; In-court hearing to determine conditions of release held 9:00 11/12/97; the INS has imposed conditions of release; counsel to submit an order reflecting conditions to the court for signature; pla to be released by 12/21/97 by Judge Eldon E. Fallon (bb) [Entry date 11/24/97]

11/25/97 [53] ORDER pursuant to order and reasons of 10/30/97 by Judge Eldon E. Fallon Date Signed: 11/24/97 (bb) [Entry date 11/25/97]

11/26/97	[54] JUDGMENT: Ordered that there be jgm in favor of pla and agst dfts, granting pla's pet for h/c relief by Judge Eldon E. Fallon (CLOSED) (bb) [Entry date 11/26/97]
12/18/97	[59] MINUTE ENTRY(12/17/97): denying Govt's motion to alter or amend judgment [51-1] by Judge Eldon E. Fallon (bb) [Entry date 12/19/97]
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6/3/98	Appellant's Brief filed by Appellant John B Z Caplinger, Appellant US Immigration. Copies of brief: 7 # of pages: 54. Date of COS: 5/26/98 Word Count: 13261. Sufficient [Y/N]: y . [97-31345] A/Pet's Brief ddl satisfied. E/Res's Brief due on 7/3/98 for Kestutis Zadvydas. (trm)
8/18/98	Appellee's Brief filed by Appellee Kestutis Zadvydas. Copies of Brief: 7 # of pages: 42. Lines of text: 1259 Date of COS: 8/18/98 Sufficient [Y/N]: y. [97-31345] E/Res's Brief ddl satisfied. Reply Brf due on 9/1/98 for US Immigration, for John B Z Caplinger. (trm)

9/14/98	Reply brief filed by Appellant John B Z Caplinger, Appellant US Immigration. Copies of Brief: 7 # of pages: 29. Word count: 6993 Date of COS: 9/8/98 Sufficient [Y/N]: y. [97-31345] Reply Brief ddl satisfied. (trm)
4/26/99	Supplemental brief filed by Appellant Lynne Underdown, Appellant US Immigration. Copies of Brief: 7 # of pages: 19. Date of COS: 4/22/99 [97-31345] A/Pet Supplemental Brief ddl satisfied. (hjg)
8/11/99	Opinion filed. Issd in T form? Y Issue Mandate due on 10/4/99. [97-31345] (rmf)
8/11/99	Judgment entered and filed. [97-31345] (rmf)
10/13/99	COURT Order filed denying petition for rehearing en banc [1410833-1] With poll (Y/N)?: n Issue Mandate due on 10/20/99. Copies to all counsel. [97-31345] (mcs)
11/2/99	CLERK Order filed granting appellee's motion to stay mandate [1432842-1] until 12/2/99 ONLY. Issue Mandate ddl updated to 12/3/99. Copies to all counsel. [97-31345] (kgl)
11/22/99	Second Motion filed by Appellee Kestutis Zadvydas to stay the mandate [1464377-1] Response/Opposition due on 12/3/99. Excess Pages? (Y/N) n [97-31345] (lbm)
12/20/99	COURT Order filed granting appellee's motion to further stay of the issuance of the mandate [1464377-1] until 1/11/00. Issue Mandate ddl updated to 1/11/00. (WG) Copies to all counsel. [97-31345] (kgl)

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37. I have had the following excludable classes explained to me and state that I am not, except as hereinafter stated, a member of any one of the following classes of individuals excluded from the United States under the Immigration and Nationality Act: (1) persons who have had one or more attacks of insanity; (2) persons who are mentally deficient; (3) persons who are afflicted with tuberculosis in any form, leprosy, or any dangerous contagious disease; (4) a person suffering from a physical defect, disease, or disability found by the Attorney General to affect the ability of such person to earn a living, unless such person affirmatively establishes that they will not have to earn a living; (5) persons convicted of, or who admit committing, a crime involving moral turpitude, or committing acts constituting the essential elements of such a crime, with the exceptions stated in the Act; (6) persons convicted of two or more offenses for which the aggregate sentences to confinement actually imposed were 5 years or more; (7) procurers, prostitutes or persons engaged in procuring, or persons coming to the United States solely, principally, or incidentally to engage in prostitution, procurement, or persons attempting to procure, or persons who have procured or attempted to procure or import, prostitutes or persons for the purpose of prostitution, or for any other immoral purpose; (8) persons who are or have been employed by or through or have received the proceeds of prostitution; (9) persons coming to the United States to engage in any other unlawful commercialized vice; (10) persons coming to the United States to engage in any unlawful commercialized vice; (11) persons coming to the United States to perform skilled or unskilled labor who do not meet the requirements of the Act; (12) persons likely to become public charges; (13) persons excluded from admission and deported, or persons arrested and deported, or persons failing upon departure and removal, or persons removed as alien enemies, or persons removed at Government expense, who do not have the Attorney General's permission to reapply for admission; (14) stowaways, persons procuring, or who have sought to procure, visas or other documentation, or who seek to enter the United States by fraud, or by willful misrepresentation of a material fact; (15) persons who do not possess valid unexpired immigrant visas, reentry permits, border crossing identification cards or other documentation required by the Act, and who seek admission or adjustment under another identity or nationality; (16) quota immigrants not properly documented, or who are not in admissible classification under the quota provisions of the Act; (17) persons ineligible to citizenship or draft deserters, or persons who have departed from or have remained outside the United States to evade or avoid training or service in time of war or national emergency; (18) persons convicted of a violation of any law or regulation relating to the illicit narcotic drug traffic or of any law or regulation governing commerce or manufacture of narcotic drugs as provided in the Act; (19) persons who seek admission from foreign contiguous territory or adjacent islands after arriving thereon by nonregistered or nonregistering transportation lines; (20) persons arriving to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States; (21) persons who are, or at any time have been, anarchists, Communists, or other political subversives, as specified in Sec. 212 (a) (28) of the Act; (22) persons who after entering the United States probably would engage in activities prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in any other activity subversive to the national security, or engage in any activity a purpose of which is opposition to, control or overthrow of, the United States Government by force, violence or other unconstitutional means, or who, affiliate with, or participate in the activities of any organization registered or required to be registered under Sec. 7 of the Subversive Activities Control Act of 1950; (23) persons accompanying other persons ordered excluded, deported, and required to be barred from admission on mental or physical disability or infancy pursuant to Sec. 237 (a) of the Act, whose protection or guardianship is required by the persons excluded and deported; (24) persons who at any time, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law.

I have been informed concerning both the classes of excludable aliens enumerated in section 212 (a) (28) of the Immigration and Nationality Act, and the defector and other classes provided for in subparagraph (i) thereof. I hereby declare that I am not and never have been a person specified in such section, except as may be claimed under Item 38 of this application.

X ____

38. I have had the exceptions to the foregoing excludable classes explained to me and claim to be exempt from exclusion on account of membership in the class or classes listed above because:

X ____

Stasys Zobylas
(Signature of alien) (Do not write)

[Seal] Subscribed and sworn to before me this 21th day of for son Rentutis ..., 19 58

Visa issuance recommended
(Immigration officer)

Fee No. ____
Fee stamps collected

Vice Consul of the United States of America.

U. S. DEPT. OF JUSTICE
ADMITTED
DEC 6 1966
PORT OF NEW YORK N.Y.
IMMIG. & NAT. SERVICE

(8300) UNITED STATES OF AMERICA
IMMIGRANT VISA AND ALIEN REGISTRATION

(3)

The immigrant named herein arrived in the United States at the
on FT 12583
(Dep. admin. port)
and was inspected by the said admitted / detained for further inquiry by special inquiry officer
under Section PL 703 (V-W) of the Immigration and Nationality Act.

(Immigration officer)

ACTION OF SPECIAL INQUIRY OFFICER

The immigrant named herein was (admitted) (excluded) { and no appeal taken / and appeal taken }
under Section ____ of the Immigration and Nationality Act.

Date ____

(Immigration officer)

ACTION ON APPEAL

Admitted ____ Excluded ____ Date ____

STATISTICS

IMMIGRANT CLASSIFICATION:
Nonquota P.L. 203, Sec. 4(a)(2) Quota
(Symbol) (Symbol)

American Consulate General
at Munich, Germany

IMMIGRANT VISA NO. 78324

Issued on SEP 24 1958
(Day, month, year)

The validity of this visa expires midnight, S. T., as the end of
JAN 23 1959
(Day, month, year)

Nationality (if stateless, so state, and give previous nationality) Stateless

Section 3 of the Refugee Relief Act of 1953 and
This visa is issued under Section 221 of the Immigration and Nationality Act and upon the basis of the facts stated in the application. This visa does not entitle the bearer to enter the United States if, upon arrival at a port of entry in the United States, he is found to be inadmissible under the law.

[Seal] John E. Ewendling
John E. Ewendling
Vice Consul of the United States of America.

Fee No. ____
Fee stamps Gratis
Examined and found admissible under Sec. 203 on OCT 1 1958 at Munich
Immigration Officer

Passport No. 0135133
German Heimatausweis
or other travel document (describe)

Issued: Stasys Zobylas, wife and 6 children
To Geo. Pingel, Germany
By ____
On Nov 21, 1957

Expires Nov 21, 1957

PLAINTIFFS EXHIBIT 3

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE IMMIGRATION JUDGE
P.O. BOX 750
OAKDALE, LOUISIANA 71463

File: A 20 823 956

IN RE: Kestuties ZADVYDAS a/k/a Kestuties Cadards a/k/a Kestutis Zadvydes a/k/a Chris Zadvydas a/k/a Kestuties Zadwydas
RESPONDENT IN CUSTODY
REDETERMINATION PROCEEDINGS

ON BEHALF OF RESPONDENT:
Kestuties Zadvydas
5060 E. Whatley Rd.
Oakdale, LA 71463

ON BEHALF OF THE SERVICE:
Lorraine Griffin, Esq
General Attorney
Imm. & Nat. Svc
Oakdale, LA 71463

MEMORANDUM DECISION
OF THE IMMIGRATION JUDGE

The respondent is a male, native and citizen of Germany who entered the United States on December 6, 1956. At that time he was admitted as an immigrant.

The Service determined that the respondent must be detained without bond pursuant to section 242(a)(2) of the Immigration and Nationality Act on the ground that he is an alien convicted of an aggravated felony as defined in section 101(a)(43) of the Act. The respondent requested a redetermination of his custody status and a bond redetermination hearing was held on February 28, 1994.

At that hearing, it was determined that the respondent was convicted on August 17, 1992 of possession of

cocaine with intent to distribute in the state of Virginia. This offense is an aggravated felony.

As an alien convicted of an aggravated felony, the respondent's bond proceedings are governed by section 242(a)(2) of the Act. Section 242(a)(2)(B) of the Act provides as follows:

> (B) The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

In bond proceedings governed by section 242(a)(2)(B) of the Act, the respondent bears the burden of showing that he is lawfully admitted to the United States, not a threat to the community, and likely to appear at any scheduled hearings; *Matter of Ellis*, Interim Decision 3197 (BIA 1993).

The respondent testified that he last resided at an address he could not remember in Houston, Texas. He said that he lived there for ten years. He added that he was just visiting Virginia when he was arrested there.

The respondent testified that he is married and has one daughter born in the United States. He said his wife is a lawful permanent resident from the Dominican Republic. He said his father is deceased and his mother lives in New York. He also has three brothers and four sisters.

The respondent testified that he was last employed for two years as a manager at Coco Fashions, a clothing

store. Before that, he worked for ten years as a carpenter in New York.

Concerning his criminal record, the respondent admitted that he was convicted of the cocaine offense discussed above. He said he was sentenced to 16 years of which six were suspended. He said he served two years of the sentence. He said he was also convicted in New York of attempted robbery on December 8, 1966. He said he was sentenced to six years and served five years of the sentence. He said he was also convicted of attempted burglary in New York on February 7, 1974. He could not remember his sentence or the amount of time he served. He said he was also arrested in 1964 and charged with car theft. He could not remember the disposition of the case but recalled that he spent no time in jail. The respondent testified that he has no other criminal record as an adult. He said he had a record as a juvenile including an arrest for running away from home in 1960 or 1961.

The respondent testified that he used cocaine in 1987. He said that he ceased to use it when he was arrested that same year. He added that he was in hiding from 1987 until he surrendered himself to the authorities in 1992. He said he did not use drugs during that time. He said that during his last incarceration he attended a three month drug rehabilitation program and also worked on his GED.

On cross-examination by counsel for the Service, the respondent admitted an additional arrest by the FBI for flight to avoid prosecution. He said the charges were dismissed. He also admitted that he had failed to appear three times on the burglary charge in the 1970's. Counsel also stated that the Service file showed a conviction for

trespass in 1975 but the respondent could not recall it. The respondent also admitted that he had been in deportation proceedings previously. He said he was released from the custody of the Service. Counsel stated that the Service file reflected that the deportation case had been remanded to the District Director to consider the respondent's application for a 212(c) waiver but no disposition was shown.

In the instant case, the parties do not dispute that the respondent is a lawfully admitted alien. Therefore, the only issues are whether the respondent has demonstrated that he is not a threat to the community and is likely to appear for future hearings. It is not really necessary to decide the first issue for his five year flight from prosecution and the information brought out by the Service on cross-examination casts serious doubt on the respondent's likelihood to appear at future hearings. Since the respondent has failed to overcome the presumption against his release, it is necessary to make the following order.

ORDER: IT IS ORDERED that the requested change in bond be DENIED.

Date: Mar. 14, 1994 /s/ Charles A. Wiegand, III
Oakdale, LA Immigration Judge

Decision of the Board of Immigration Appeals
U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A20 823 956 Oakdale Date: APR-8 1994
In re: KESTUTIES ZADVYDAS –
IN BOND PROCEEDINGS PURSUANT TO
8 C.F.R. § 242.2(d) – APPEAL
ON BEHALF OF RESPONDENT: Pro Se
ON BEHALF OF SERVICE: Lorraine L. Griffin
General Attorney

APPLICATION: Reduction in the amount of bond

ORDER:

PER CURIAM. The decision of the immigration judge dated February 28, 1994, in a bond redetermination hearing, in which the lawful permanent resident respondent was denied a change in status from detention in the custody of the Immigration and Naturalization Service, is affirmed. We have applied *De La Cruz* standards in our review which require the examination of factors relating to whether the respondent is a threat to the community and is likely to appear for any scheduled hearing. *Matter of De La Cruz*, Interim Decision 3155 (BIA 1991). We affirm the immigration judge's finding that the respondent failed to rebut the presumption against his release. *Matter of Ellis*, Interim Decision 3197 (BIA 1993); *Matter of De La Cruz*, supra. The respondent's appeal, accordingly, is dismissed.

/s/
Acting Chairman

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
OAKDALE, LOUISIANA

[TITLE OMITTED IN PRINTING]

CHARGES: Section 241(a)(2)(A)(ii) of the Immigration and Nationality Act; an alien convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct

Section 241(a)(2)(B)(i) of the Immigration and Nationality Act; an alien convicted of a violation of any law or regulation relating to a controlled substance

Section 241(a)(2)(A)(iii) of the Immigration and Nationality Act; an alien convicted of an aggravated felony

APPLICATION: A waiver under section 212(c) of the Immigration and Nationality Act

IN BEHALF OF THE RESPONDENT:
Kestuties Zadvydas
BOP# 04977-265
5060 E. Whatley Rd.
Oakdale, LA 71463

IN BEHALF OF THE SERVICE:
Joyce L. Richard
General Attorney
Imm. & Nat. Svc.
Oakdale, la 71463

ORDER OF THE IMMIGRATION JUDGE

The respondent is a 45 year old male native and citizen of Germany who entered the United States as an immigrant on December 6, 1956. On December 8, 1966, he was convicted in the state of New York of the offense of attempted robbery. On February 7, 1974, he was convicted in the state of New York of the offense of

attempted burglary. On August 17, 1992, he was convicted in the state of Virginia of the offense of possession of cocaine with intent to distribute.

At a hearing on the issue of deportability, conducted on March 29, 1994, the respondent declined the assistance of counsel and elected to proceed pro se. He admitted all of the allegations of fact contained in the Order to Show Cause and was found to be deportable as charged.

As relief from deportation, the respondent applied for waiver under section 212(c) of the Act. Since the respondent entered the United States so long ago, his eligibility for registry under section 249 of the Act was also considered. In order to qualify for registry under section 249 of the Act, an alien must establish that he entered the United States prior to January 1, 1972, has had his residence in the United States continuously since entry, is a person of good moral character, is not ineligible to citizenship as the term is defined in section 101(a)(19) of the Act, is not inadmissible under section 212(a) of the Act as it relates to criminals, procurers and other immoral persons, subversives, narcotics law violators, and smugglers of aliens. He must also establish that he merits a favorable exercise of discretion.

The concept of good moral character is discussed in section 101(f) of the Act. Section 101(f)(8) of the Act, as amended by the Immigration Act of 1990, provides that a person who has been convicted of an aggravated felony cannot demonstrate good moral character even if the conviction took place outside the statutory period. Since

the respondent has been convicted of an aggravated felony after November 29, 1990, he cannot demonstrate the good moral character necessary for registry.

At the hearing on the application for relief, conducted on April 26, 1994, the respondent testified that he was married in 1982 to a lawful permanent resident from the Dominican Republic. He and his wife have a 13 year old daughter who resides with his wife. His wife and daughter live in Houston, Texas. The respondent testified that his mother resides in New York. His two sisters and three brothers all live in the New York area. The respondent testified that he has no relatives in his native country. The respondent testified that he entered the United States on December 6, 1956. He was then eight years of age. He said he has not left the United States since entry and no longer speaks German except for a few words and phrases.

The possibility that the respondent had derived United States citizenship was also explored. His mother and father were both aliens but his mother later remarried. She became a citizen of the United States by naturalization but did so when the respondent was over the age of 18. Therefore, he did not derive United States citizenship.

The respondent testified concerning his employment history. He said that all of the jobs listed on the application for relief were "off the books" and he paid no income tax on his earnings.

He said that his wife is employed by her brother, the owner of Coco Fashions in Houston, Texas. He said her gross salary is $325 a week and added that she has been

struggling financially during his absence from the family. He testified that he remains close to his wife and daughter and speaks to them daily by telephone.

By reference to Exhibits 3, 4, 5 and 7 as well as through the respondent's testimony, it was determined that the respondent has the following criminal history. He was first-arrested on June 25, 1966 and charged with robbery and several other crimes. He said he was convicted and sentenced to six years in prison of which he served five years. He was paroled on June 18, 1971 and then taken into custody by the Service. The respondent testified that he was held for a week, saw an Immigration Judge during that time, and then released. He said he never returned for a future hearing.

The respondent was next arrested on August 31, 1973 and charged with auto theft. He was convicted on his plea of guilty and sentenced only to the time he had served awaiting trial. His next arrest was on November 14, 1973 when he was charged with burglary. He entered a plea of guilty on March 7, 1974 and was sentenced to a period of incarceration of between one and a half to three years. During the pendency of that case, he was again arrested for burglary. That charge resulted in a conviction and a sentence of one year which he served concurrently with the sentence imposed on March 7, 1974. During this period of incarceration, the respondent was several days late returning from a furlough or a work release program. This took place in September 1976. The prison authorities viewed it as an escape but the respondent said it was not that serious. He was punished for the incident. The respondent was released from prison on July 7, 1977.

The respondent testified that he began using cocaine in 1987. He said used it every day for about seven months. During a trip to visit relatives Virginia he wanted to buy some cocaine but had no money. He agreed to deliver a package of cocaine in exchange for some cocaine for his own use. He was arrested and charged with possession of cocaine with intent to distribute. The respondent testified that he fled from Virginia to avoid these charges and returned to Houston, Texas where he ceased his use of cocaine. The respondent testified that in 1992 he turned himself in to the police in Houston, was returned to Virginia, and convicted of the charges pending there. He was sentenced to 16 years in prison of which six years were suspended. The respondent testified that he served two years of this sentence and was released on parole in January 1994 when he was again taken into custody by the Service. He added that he will be on parole until 1997.

The respondent testified that during his last incarceration he worked on his GED and also took a three month drug awareness program. Although he had abandoned the use of drugs, he thought the course would be worthwhile.

On cross-examination by counsel for the Service, the respondent discussed the deportation proceeding in 1977. Although the respondent recalls being released from the custody of the Service without conditions, Group Exhibit #8 shows that he was released on his own recognizance. Among the conditions imposed upon him were that he not change his place of residence from New York City without first obtaining Service permission, that he report any change of address or employment to the Service, and

that he report in person to the Service office in New York on August 31, 1977. The record also reflects that the respondent's deportation case was remanded to the Service by the Immigration Judge for adjudication of an application for a 212(c) waiver, that the application was denied by the Service on February 10, 1982, that the deportation hearing was rescheduled for August 25, 1982, and that the respondent failed to appear for that hearing.

Section 212(c) of the Immigration and Nationality Act provides that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted to the United States in the discretion of the Attorney General without regard to the grounds for exclusion contained in section 212(a) other than sections 212(a)(3) and 212(a)(9)(C). Section 212(c) does not provide a waiver to all aliens who merely demonstrate statutory eligibility of lawful permanent residence and seven years' domicile. The alien bears the burden of demonstrating that his application merits a favorable exercise of discretion; *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). The Immigration Judge is required to balance the adverse factors of record evidencing an alien's undesirability as a permanent resident against the favorable factors and social and humane considerations to determine if the granting of relief is in the best interest of the United States. Among the negative factors to be considered are the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its

nature, recency, seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (such as affidavits from family, friends, and responsible community representatives); *Matter of Marin, supra; Matter of Salmon,* 16 I&N Dec. 734 (BIA 1978); *Matter of Khalik,* 17 I&N Dec. 518 (BIA 1980).

The equities that an applicant for section 212(c) relief must bring forward to establish that favorable discretionary action is warranted will depend in each case on the nature and circumstances of the ground of exclusion sought waived and on the presence of any additional adverse factors. As the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities. Such a showing at times may be required solely by virtue of the circumstances and nature of the exclusion ground sought waived; *Matter of Marin, supra.* In a case involving a criminal conviction, the gravity of the offense must be examined; *Matter of Buscemi,* 19 I&N

Dec. 628 (BIA 1988). The necessity of demonstrating unusual or outstanding equities may be required by the presence of a conviction of a single serious crime such as an offense involving controlled substances, or it may be required because of a succession of criminal acts which together establish a pattern of serious criminal misconduct; *Id.* An alien who demonstrates unusual or outstanding equities when required merely satisfies the threshold test for having a favorable exercise of discretion considered in his case. Such a showing does not compel that discretion be exercised in his favor, *Id.* In some cases, the seriousness of the crime may still not be overcome by the equities demonstrated, even though the equities are unusual or outstanding; *Matter of Roberts,* Interim Decision 3148 (BIA 1991); *Matter of Buscemi, supra.*

Aliens who have been convicted of a crime should make a showing of rehabilitation before relief under section 212(c) will be considered as a matter of discretion; *Matter of Marin, supra; Matter of Buscemi, supra.* However, rehabilitation is only one factor to be considered and should not be viewed as an absolute prerequisite to a favorable exercise of discretion; *Matter of Edwards,* Interim Decision 3134 (BIA 1990).

Aliens who are incarcerated or who have recent convictions have a more difficult burden than those whose criminal activity is in the more distant past; *Matter of Marin, supra.*

In the instant case, the respondent's conviction for possession of cocaine with intent to deliver is a serious adverse factor in the exercise of discretion which may be overcome, if at all, only by a showing of outstanding or

unusual equities. His other convictions are additional adverse factors in the exercise of discretion and it is incumbent upon him to demonstrate countervailing equities.

The respondent has demonstrated family ties in the United States in the form of his mother, five siblings, a wife, and a daughter. Considering the fact that the respondent has no family in Germany, this is an outstanding equity.

The respondent has resided in the United States for over 37 years and was only eight years old at the time of his entry. This equity is diminished by his criminal history which began in June of 1966 and spans 27 of his 37 years of residence. For most of the last 27 years, he has been either engaged in criminal activity, in prison, or a fugitive.

The respondent's family may suffer emotional hardship if the respondent is separated from them by deportation. This would not be beyond the hardship to be suffered by the family of any deportee. In this regard, I note that none of the respondent's relatives testified in his behalf or even provided affidavits. This causes me to question the strength of his relationship with his family members. Assuming for the sake of argument that he has a close relationship with his relatives in the United States, the emotional hardship to his daughter would be greatest for she would be forced to grow up without a father if her mother does not choose to join the respondent in Germany. However, this would not be a unique situation for her. She has been previously separated from the respondent due to his incarceration. Financially, the child's

needs have been met by her mother and there is no indication that this situation will not continue.

The hardship that deportation would cause the respondent would be great. In fact, it would be extreme hardship for he has resided in the United States for over 37 years, has not been back to Germany during all of that time, has no family ties in his native country, and does not speak the German language. This hardship is the respondent's principal equity and it rises to the level of outstanding or unusual.

Considering the length and severity of the respondent's criminal history, rehabilitation is an important factor in this case. In this regard, the respondent points to the fact that, except for his last conviction, he has been convicted of no crimes since his release from prison in 1977. He also argues that he rid himself of the use of drugs following his arrest in 1987, took a drug awareness course during his last period of incarceration, and surrendered himself to the authorities in 1992. While the respondent may be making strides toward rehabilitation, I take notice of the fact that he absconded during the pendency of deportation proceedings in 1973, abused the privilege of a supervised release from prison in 1976, fled to avoid prosecution in 1987, and was a fugitive from justice from 1987 until 1992. He also minimized in his testimony his participation in the drug-trafficking scheme. In weighing all of the facts regarding the issue of rehabilitation, I cannot make a conclusive finding that a positive showing of genuine rehabilitation has been made.

The respondent has demonstrated many positive equities in his favor. Not the least of these is his long residence in the United States and the extreme hardship that he would suffer if he is deported. Some of his equities rise to the level of outstanding or unusual.

Weighing against a grant of relief are extremely serious negative factors such as the respondent's criminal history which extends over a period of almost 28 years and includes burglaries, thefts, and armed robberies, his abuse of drugs, his distribution of drugs, his flights to avoid prosecution and prison, and his questionable rehabilitation. This is a case like *Matter of Roberts, supra* and *Matter of Buscemi, supra,* in which a favorable exercise of discretion is not warranted in spite of a showing of outstanding or unusual equities.

ORDER: It is ordered that the respondent's application for a waiver under section 212(c) of the Act be denied.

It is further ordered that the respondent be deported from the United States to Germany on the charges contained in the Order to Show Cause.

May 2, 1994
Date
Oakdale, LA

/s/
Charles A. Wiegand, III
Immigration Judge

U.S. Department of Justice
Immigration and Naturalization Service

[SEAL]

P.O. Box 5095
207 East 5th Avenue
Oakdale, LA 71463-5095

July 26, 1994

Consulate General of Lithuania
Attn: Consul General
420 – 5th Avenue
New York, NY 10018

RE: ZADVYDAS, Kestuties
A20 823 956

Dear Sir/Madam:

Please accept this letter with enclosed documents as a formal request for a travel document on behalf of Kestuties Zadvydas, a native and citizen of Lithuania.

Mr. Zadvydas entered the United States at New York, New York, on December 6, 1956 as an immigrant.

Mr. Zadvydas was convicted in Supreme Court, Queens County, New York on August 17, 1992 for possession with intent to distribute cocaine. Mr. Zadvydas was sentenced to a term of 16 years and is presently in our custody.

Mr. Zadvydas was afforded a hearing before an Immigration Judge on May 2, 1994 to answer the charge on the attached Order to Show Cause. As a result of his hearing, Mr. Zadvydas was ordered deported from the United States as documented by the attached order of the Immigration Judge.

Mr. Zadvydas will be scheduled to depart the United States upon receipt of a travel document.

If we may be of further assistance to you in this matter, please feel free to contact Officer Kipp at the above address.

Sincerely,

Nancy L. Hooks
Officer in Charge
attachments

CONSULATE GENERAL OF THE
REPUBLIC OF LITHUANIA
Lietuvos Respublikos Generalinis konsulates

420 FIFTH AVENUE **TEL: 212 354-7840**
NEW YORK, NY 10018 **FAX: 212 354-7911**

August 22, 1994
03-06-161

Ms. Nancy L. Hooks
Immigration and Naturalization Service
New Orleans District
P.O. Box 5095
207 East 5th Avenue
Oakdale, LA 71463-5095

Dear Ms. Hooks,

Thank you for your letter dated July 26, 1994, regarding deportation of Mr. Kestuties Zadvydas.

Please be advised that Consulate General can not issue a travel document to Mr. Zadvydas since he is neither citizen nor permanent resident of the Republic of Lithuania.

If you have questions or need additional information, do not hesitate to call me at (212) 354-7840.

Sincerely,

/s/ Darius Gaidys
Darius Gaidys
Consul

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
OAKDALE, LOUISIANA

A20-823-956
IN THE MATTER OF:
Kestuties ZADVYDAS
RESPONDENT IN DEPORTATION PROCEEDINGS

CHARGE: Section 241(a)(2)(A)(ii) of the Immigration and Nationality Act of 1990 – Convicted of Two Crimes Involving Moral Turpitude Not Arising Out of a Single Scheme of Criminal Misconduct Section 241(a)(2)(B)(i) of the Immigration and Nationality Act of 1990 – Controled Substance Violation
Section 241(a)(2)(A)(iii) of the Immigration and Nationality Act of 1990 – Convicted of an Aggravated Felony

APPLICATION: Motion to Reopen
Deportation Proceedings

ON BEHALF OF THE RESPONDENT:
Rickey A. Watson
6907 Beechnut
Houston, TX 77074

ON BEHALF OF THE SERVICE:
Joyce L. Richard
INS General Attorney
P.O. Box 5096
Oakdale, LA 71463

ORDER OF THE IMMIGRATION JUDGE

The respondent is a forty-six year old male who is a native and citizen of Germany. He entered the United States as an immigrant on December 6, 1956. On December 8, 1966, the respondent was convicted in the state of New York for the offense of attempted robbery. On February 7, 1974, he was convicted in the state of New York for

the offense of attempted burglary. On August 17, 1992, he was convicted in the state of Virginia for the offense of possession of cocaine with intent to distribute.

On January 24, 1994, the Service issued an Order to Show Cause, charging the respondent as deportable under INA sections 241(a)(2)(A)(ii), Convicted of Two Crimes Involving Moral Turpitude Not Arising Out of a Single Scheme of Criminal Misconduct, 241(a)(2)(B)(i), Controlled Substance Violation and 241(a)(2)(A)(iii), Convicted of an Aggravated Felony.

A hearing concerning the issue of deportability was conducted on March 29, 1994. The respondent admitted to all the allegations in the Order to Show Cause, and he was found deportable. The respondent applied for a waiver of deportation under INA section 212(c). During his relief hearing on April 26, 1994, this Court considered whether the respondent should be granted a section 212(c) waiver as a matter of discretion, whether he was statutorily eligible for registry under INA section 249 and whether he had derived citizenship.

After hearing the facts of the case and reviewing the applicable law, the Court concluded that the respondent was not eligible for registry and he was not a United States citizen. On May 2, 1994, the Court issued a written order denying the respondent's application for a waiver under section 212(c) and ordering him deported to Germany. There is no indication that the respondent filed an appeal. Therefore, the order of deportation is administratively final. *See* 8 C.F.R. section 243.1 (1994).

On January 9, 1995, the respondent, through his counsel, filed a motion to reopen deportation proceedings. The respondent bases his motion on the grounds that he is eligible for a waiver of deportation because he has resided in this country for over twenty years, he has been married to a lawful permanent resident for over eight years and he is the father of a United States citizen. The Service opposes the motion.

Motions to reopen deportation proceedings are governed by 8 C.F.R. sections 3.23(b), 103.5 and 242.22 (1994). In order for a motion to reopen to be granted, the alien must state new facts that he intends to establish, supported by affidavits or other evidentiary materials and why these facts were not initially available. *INS v. Wang*, 450 U.S. 139, 140-41 (1981) (per curiam); *Matter of Leon-Orosco and Rodriguez-Colas*, 19 I&N Dec. 136, 139 (BIA 1983, A.G. 1984); 8 C.F.R. section 103.5 (1994). The motion must also make a *prima facie* showing that the alien is eligible for the relief sought in the reopened proceedings. *INS v. Abudu*, 485 U.S. 94, 97 (1988); *Wang, supra*, 450 U.S. at 141.

In the present case, the respondent's motion fails on both procedural and substantive grounds. Pursuant to 8 C.F.R. section 3.23(b)(1) (1994), "Any motion to reopen for the purpose of acting upon an application for relief must be accompanied by the appropriate application for relief and all supporting documents." The respondent is requesting relief under section 212(c), but he failed to include a relief application. Thus, the motion to reopen fails on procedural grounds.

With respect to the substantive grounds, the respondent cannot make a *prima facie* showing of eligibility. Relief under section 212(c) is only available to lawful permanent residents. *See* INA section 212(c). An alien is no longer a lawful permanent resident once a final administrative order of deportation has been entered against him. *Rivera v. INS*, 810 F.2d 540, 541 (5th Cir. 1987); *Matter of Cerna*, Int. Dec. 3161 (1991). In the instant case, the respondent was ordered deported and he did not file an appeal. Thus, the order is administratively final. Therefore, the respondent is no longer a lawful permanent resident and is ineligible for section 212(c) relief.

For all the foregoing reasons, the motion to reopen will be denied.

ORDER: It is ordered that the respondent's motion to reopen deportation proceedings be DENIED.

/Jan. 19, 1995	/s/
Date	Charles A, Wiegand,
Oakdale, LA	Immigration Judge

Memorandum

U.S. DEPARTMENT OF JUSTICE [SEAL]
Immigration and Naturalization
Service
Southern Region

Subject:
ZADVYDAS, Kestuties
A20 823 956
COB: Germany/Lithuania
DOB: 11/21/48

Date
February 1, 1995

To
John B. Z. Caplinger
District Director
New Orleans, LA

From
Michael J. Kipp
Deportation Officer
Oakdale, LA

Thru Official Channels.[1]

Subject above claims to be a citizen of Germany and or Lithuania. Subject entered the United States on December 6, 1956 through New York City as an immigrant. Subject has the following convictions:

1) 12/08/66 convicted of attempted robbery – sentenced to 6 years.

2) 02/07/74 convicted of attempted burglary – sentenced to 3 years.

---

[1] Handwritten in original.

3) 08/17/92 convicted of possession with intent to distribute a controlled substance – sentenced to 16 years.

Subject Zadvydas was charged with 2 CIMT's and violation of a controlled substance, which makes him an aggravated felon.

Subject Zadvydas requested 212(c) relief which was denied and he was ordered deported to Germany on May 2, 1994. On January 9, 1995 Mr. Zadvydas filed a motion to reopen deportation proceeding. It was denied on January 19, 1995.

Numerous attempts have been made to obtain a travel document for subject Zadvydas without success. The following requests were made.

1) 05/05/94 request for t/d sent to German Consulate.

2) 05/22/94 request refused by Germany.

3) 07/26/94 request for t/d made to Lithuanian Consulate.

4) 08/22/94 Lithuanian Consulate refused to issue a travel document.

5) 06/14/94 German Consulate requested additional documents, which were sent to them.

6) 06/28/94 German Consulate again refused to issue a travel document.

7) 07/21/94 letters of assistance to Interpol to obtain a travel document were without success.

8) 10/03/94 Joan C. Higgins requested a travel document from the Lithuanian Consulate without success.

9) 10/14/94 State Department advised they still cannot obtain a travel document.

10) 01/24/95 second travel document request sent *to German Consulate.*[2]

Subject Zadvydas is an aggravated felon requesting release.

[2] Handwritten in original.

Generalkonsulat
der Bundesrepublik
Deutschland
Consulate General
of the Federal
Republic of Germany
Reference: RK 515/513 SE
ZADVYDAS, Kestuties hi jm
(When answering please quote)

Houston, April 6, 1995

U.S. Department of State
Immigration and Naturalization Service
P.O. Box 5095
207 East 5th Avenue
Oakdale, La. 71463-5095

Attn: Nancy L. Hooks
Officer in Charge

Re: ZADVYDAS, Kestuties, A 20 823 956

Dear Mrs. Hooks,

Thank you for your letter dated March 21, 1995.

Referring to your aforementioned letter I would like to ask you to provide further documentation concerning Mr. Zadvydas:

1 – birth certificate *in file*[1]

2 – registration document concerning his former domicile in Germany (*exact address* of his former domicile in Germany) None

Last address: Goeppingen, Germany, Staatl, Wornheim 5/8

[1] Handwritten in original.

3 – proof of the nationalities of his parents *unknown, should be in parents files: immigrated together*[2]

4 – proof of a former travel document (issued by which authority/country). *German Reiseausweis No#0135133*

Lost

I would also like to point out that the German citizenship law follows the principle of "jus sanguinis" not of "jus soli", that means that someone cannot get the German nationality just based on the fact that he/she was born in Germany.

So far I have not received any proof of Mr. Zadvydas being a German national.

Sincerely,

/s/ Rosemarie Hille
Rosemarie Hille
Vice Consul
(3) Documents from parents sent to [illegible] *Washington, DC*

[2] Handwritten in original.

Generalkonsulat der Bundesrepublik Deutschland
Consulate General of the Federal Republic of Germany
Reference: RK 515/531
ZADVYDAS,
[illegible]
(When answering please quote)

Houston, 12 Mai 1995

U.S. Department of State
Immigration and Naturalization Service
P.O. Box 5095
207 East 5th Avenue
Oakdale, La. 71463-5095

Re: ZADVYDAS, Kestuties, A 20 823 956

Dear Mrs. Hooks,

On the basis of the information your office provided, the German Consulate General in Houston has done extensive research on Mr. Kestuties ZADYVYDAS.

As I had already mentioned in my letter to your office, dated March 13, 1995, there was a strong indication that Mr. ZADVYDAS does not hold the German citizenship, which has now been confirmed.

Therefore he cannot obtain a German passport.

I return to you also the endorsed money order in the amount of US $7.50, since we cannot provide the document requested.

Sincerely,

/s/ Andrea Möhwald
Andrea Möhwald
Vice Consul

Government
Exhibit 34

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
(TITLE OMITTED IN PRINTING)

Excerpts from the Transcript of the Evidentiary Hearing, September 27, 1996, pp.9-16, 35, 51-63, 80-81

[p.9] Zadvydas – Direct

Q. I'm going to mark as Plaintiff-3 a document that appears to be the document that you had when you were a small – when you were a child, coming here, and at least part of that document – I think one of the documents in the record, but do you recognize that document?

A. I never seen it until I had wrote the Freedom of Information Act. That's how I got this document.

Q. Okay. And what does it indicate, as far as being stateless or not stateless or a citizen on that document?

A. Well, it's an Immigrant Visa and Alien Registration. It's got signatures on it.

Q. Okay, what does it say, as far as –

A. "Nationality" is "Stateless." "State and give your previous nationality." And it's got printed "Stateless."

Q. "Stateless," okay. And where did you come into possession of that document, to the best of your knowledge?

A. Immigration. Immigration.

THE WITNESS: (To the Court) It's Immigration documents.

THE COURT: I'll give it back.

BY MR. BARNARD:

Q. So, as far as you knew, the Immigration authorities had that document in their possession?

[p.10] Zadvydas – Direct

A. Yes, they did.

Q. And you got it from them?

A. Yes, I did, when I wrote the Freedom of Information Act.

Q. And it says you're stateless, –

A. Yes.

Q. – correct?

A. Yes.

THE COURT: I wish you'd point out to me where it says "stateless."

THE WITNESS: Excuse me?

THE COURT: I said I don't see where it says "stateless." I see where it says "German re – I' something.

THE WITNESS: I'll show it to you.

THE COURT: Or either. Mr. Barnard. Show me where it says "stateless."

MR. BARNARD: I'll find it, Judge. Let me see, Kestutis, I'll find it.

THE WITNESS: It's right there on the bottom.

MR. BARNARD: It's on the bottom, Your Honor.

THE WITNESS: On the right-hand corner.

MR. BARNARD: Just put your finger on it.

THE WITNESS: (Complies) Right here. If you read this right here (indicating), –

THE COURT: Let me read it.

THE WITNESS: Right here.

[p.11] Zadvydas – Direct

THE COURT: It's small print.

THE WITNESS: Yeah, it's small.

THE COURT: "Nationality: If stateless, so state." "Previous Nationality:" – it says "Stateless" in very small print on the right.

THE WITNESS: Stateless, stateless, yes, sir.

THE COURT: I just wanted to see it.

MR. BARNARD: That's okay.

THE WITNESS: I have a bigger one –

THE COURT: It's okay, I see it. I just wanted to make sure I see it.

MR. BARNARD: Actually, that's a clearer copy. I've got the bigger one, –

THE COURT: I see it.

MR. BARNARD: – too.

BY MR. BARNARD:

Q. Now, I'm going to show you Plaintiff's Exhibit Number 4, which is – well, I'll let you tell the Judge what

that appears to be. And I notice that it also has a marking "Government Exhibit 23," so it must have been introduced at some earlier occasion.

A. This is a letter that the Government – that they wrote to the Embassy of Lithuania, asking for my travel documents.

Q. Uh-huh. (affirmative response) And what -

[p.12] Zadvydas – Direct

A. And they wrote back saying that: We're not accepting him, because he's not a Lithuanian citizen.

Q. And what's the date of that?

A. I'm not a citizen, no permanent resident of the Republic of Lithuania.

Q. And that's Plaintiff-4. And what, exactly, is the date of that letter?

A. August 22nd, 1994.

Q. And when was the first time you saw that document?

A. When I received it from the Freedom of Information Act.

Q. Okay. And that would have come from the INS files, –

A. Yes.

Q. – to the best of your knowledge?

A. Yes, yes, that came from the INS files.

Q. So, now, that would have been after the hearing, obviously, though, right, the INS –

A. Oh, yeah. I didn't have none of these.

Q. I mean, but the date of the letter would indicate the INS came into possession of –

A. I was already deported, when I received it, –

Q. Right.

A. – when I got all this. I was already deported.

Q. Okay.

THE COURT: You mean you had been ordered deported?

THE WITNESS: Yes, sir. I had been ordered deported.

[p.13] Zadvydas – Direct

MR. BARNARD: Your Honor, unless there's some objection, before I forget, I would offer and introduce into evidence Exhibits 1 through 4, at this time.

THE COURT: I think they're already an Immigration record, from what I can read.

MR. BARNARD: Well, I don't think they object to it, but –

THE COURT: Oh, yes, sure. Is there any objection?

MS. BECNEL: No, no objection.

THE COURT: Let them be admitted. They're admitted.

BY MR. BARNARD:

Q. I'm going to show you another letter similar to Number 4, and ask you if you recognize Plaintiff's Exhibit 5?

A. It's another request. Immigration is asking for travel documents.

Q. From what country this time?

A. This is from German, the German Consulate.

Q. Okay, and what is the response?

A. It says – they don't have sufficient proof that I'm a citizen of that country and they're asking Immigration to send them more papers from them, you know, what they have on me, so they can send me travel documents.

Q. Okay, let me move on to a little different subject at this point. Mr. Zadvydas where are you housed at the moment?

[p.14] Zadvydas Direct

A. Orleans Parish Prison.

Q. And how long have you been there?

A. I arrived there October 3rd of '95.

Q. Okay, so you've been there almost exactly a year, now, correct?

A. Yes, sir.

Q. Could you please describe for the Court what your daily life is at the prison?

A. We're locked down in our cells 20 hours a day. They give us – we go to the yard once a week for two hours. The food is terrible. The mice are running around all over the place. There's no ventilation, no heat in the wintertime. Basically, we have no reading materials supplied. We have no church services over there. We have nothing over there.

Q. What about visitation with your family?

A. Visitation, they only give us a half an hour, which is through the booth, talking with a phone.

Q. A half hour how often?

A. Half an hour.

Q. How often?

A. I don't know.

Q. Once a day? Once a week?

A. I really don't know. I know that nobody gets visits over there, because most of the people that are over there are all from different states, you know.

[p.15] Zadvydas – Direct

Q. You mentioned mice. Where are the mice located?

A. They come up from the back windows, because the windows are opened right now in the summertime. They take the windows out, because –

Q. Is it air conditioned?

A. No air conditioning, and there's no heat in the wintertime over there, no heat at all.

Q. How many people are in the cell that you're locked down in?

A. Two people in the cell.

Q. So, you and one other person are in there?

A. Yes.

Q. And you're locked down 20 hours a day?

A. Twenty hours a day, just watch TV all day, that's all they give us is TV all day. That's it.

THE COURT: Is this the Old Parish Prison, –

THE WITNESS: Yes, sir.

THE COURT: – or is this one of the other facilities?

MR. BARNARD: I think it's the House of Detention.

BY MR. BARNARD:

Q. Aren't you?

A. The House of Detention. It's the jail.

Q. Anything else that you can tell us about the conditions?

A. Well, the medical, there's no medical over there.

[p.16] Zadvydas – Direct

Q. And have you had any medical problems that you've attempted to get attention for?

A. Yes, my ankle. I have an ankle injury that I have from 20, 30 years ago, you know. I asked to see a doctor.

When you put a sick call slip in, you've got to wait at least three or four weeks before they call you to even see a doctor over there.

Q. Has the doctor seen you about your ankle, though?

A. Yes, he's seen me, but he all he gave me was some Motrin or something. When I run out of those, I got to put another sick call slip in again and wait another three weeks. You can't get no – the nurse comes up there to pass out medication. She doesn't give you no aspirins, if you ask for aspirins. They tell you you've got to buy it. They sell it in the store. You have to buy aspirins in the store. You have to buy all your reading material in the Commissary. They don't supply us with nothing to read over there.

Q. Okay.

A. Like two hours – we only go to the yard once a week for two hours. Sometimes they won't even take us out. If the gym instructor is not there, he don't take us out, so we're stuck in the building the whole day doing nothing, you know.

Q. All right. Let me move on to something else, then. You've read the entire transcript that's marked as [end]

[p.35] Zadvydas Direct

A. Oh, yeah.

Q. So, he didn't think that your eventual release was going to be a danger to society?

THE COURT: I don't know about what he thought. I read the record and the record said he got 16, and suspended six; gave him 10. I read it.

THE WITNESS: Sixteen –

THE COURT: I read that.

THE WITNESS: I got suspended six years.

THE COURT: And then he got out early.

THE WITNESS: Two years.

THE COURT: He got out –

THE WITNESS: Two years.

THE COURT: – in '94, because you had a hearing in '94.

MR. BARNARD: Well, I think –

THE WITNESS: I got paroled. I got paroled.

MR. BARNARD: My point, Your Honor, is simply that one of the issues here is whether he's a danger and obviously the judge there could have kept him in jail for 40 years and didn't do it, so –

THE COURT: Well, I understand that.

MR. BARNARD: – he didn't see him as a danger. Okay, Mr. Zadvydas, the Government may have a few questions for you, if you could answer their questions.

[p.51] Zadvydas – Cross

– you had the Canadians, you had the British, they were all running these camps. There was a lot of European

countries fled after the war, and they wound up in Germany, these German DP Camps, all run by different governments, and my mother told me I was in a U.S. run government camp. I have a letter here, too, from the INS – I mean, from the German Embassy.

THE COURT: Well, look, the only thing I'm trying to, say is: And I am going to go back and let the Government take back its questioning, but this is as good – I'm looking at another letter in the record, Government Exhibit Number 34, which claims that they say, "Therefore, he cannot obtain a German passport." They denied you a passport on –

THE WITNESS: They denied me five times.

THE COURT: Yes, in 1995.

THE WITNESS: Five times. They denied me five times. They requested travel documents five times and they refused me five times and once with Lithuania, the German Consul of Lithuania also, –

THE COURT: All right, Counsel, let's go. Thank you very much.

THE WITNESS: – where my parents come from.

BY MS. BECNEL:

Q. Mr. Zadvydas, do you have any relatives in any other country, other than Germany, –

[p.52] Zadvydas – Cross

A. As far as I know –

Q. besides –

A. – my mother goes to Russia. She's got relatives. Some of her sisters on her side, she goes there once a year, maybe, as far as I know.

Q. And do you have any other documents, besides the passport, which – I mean, besides the Birth Certificate, which I'm not sure is going to clear up the issue?

A. I have –

Q. That would help effect your deportation to another country, perhaps not Germany or not Lithuania.

A. If it would help me, believe me, I'll go right now today to any country, just to get out of that place, okay. I've been there for – Immigration has been holding me now for over almost three years now, they've been trying to deport me for three years now.

MR. BARNARD: I think everybody is kind of aware of this, but I believe Lithuania was part of the Soviet Union for quite some time. Maybe –

THE WITNESS: That's why they fled, because, you know, communism, after the war, they fled and then wind up in Germany in the DP Camps. Lithuania is not the communists no more.

MR. BARNARD: No.

THE WITNESS: But, they're not accepting me, because

[p.53] Zadvydas Cross

I was born in Lithuania. I'm not a citizen of Lithuania.

I wasn't born in Lithuania, even though my parents came from Lithuania.

MR. BARNARD: Well, I'm just saying maybe Russia has a different policy.

THE COURT: I don't know.

BY MS. BECNEL:

Q. You said your mother goes back and forth to Russia. Is she visiting family in Russia?

A. On her side, that's what she tells me. She has a sister over there. She goes to Russia maybe once a year.

Q. So, perhaps, we could effect your deportation to Russia?

A. Russia won't accept me. They won't accept me. I wasn't born there.

Q. So, again, I just want to make this clear for the record: You don't have a legal basis for staying in the United States?

A. Yes.

Q. You understand that you have been found not to be a United States citizen?

A. Yes. I understand that, yes.

Q. So, it's a matter of effecting your deportation.

A. But, I don't – but, what my issue here is: I know that the Immigration will never deport me –

Q. Although they're continuing –

A. As sure as I believe that there is a God in Heaven, that's

[p.54] Zadvydas – Cross

how sure I am that Immigration will never deport me, and that would result in my lifelong incarceration. Immigration is not going to deport me to no country. Believe me, I'm willing to go to any country right now, but there is no country that's going to accept me, and I know it. German refused me, I was born in a camp. Lithuania refused me, because my parents were from there and they said I'm not a citizen. What other country is going to accept me?

Q. Well, INS is continuing to effect your deportation, –

A. Well, the INS has been trying –

Q. trying to obtain –

A. that for two years. I have another over here, a requested TD sent to the German Consulate, refused. Requested TD sent to Lithuania, refused. The German Consulate again refused. Letters of assistance to Interpol; letters of assistance to Interpol, to obtain travel documents were without success.

Q. Have you communicated with INS or –

A. JoAnn C. Higgins requested a travel document from the Lithuanian Embassy, again refused.

Q. Again, the INS is continuing to try to effect your deportation. We're just trying to find a country that will –

A. Okay. Well, see, that's just –

Q. Have you expressed to Deportation or to INS that you'd be

[p.55] Zadvydas Cross

willing to go to Russia? I don't believe that any travel documents have been tried to be obtained from Russia. From my records, I don't believe they've even tried to effect your deportation to Russia. This is the first that we're hearing of Russia.

A. But,

Q. If your mother goes to Russia and you have family in Russia, we can try to effect your deportation to Russia.

THE WITNESS: Your Honor, I really don't understand none of this, because –

THE COURT: Well, the law is to the effect, and that's why –

THE WITNESS: I know –

THE COURT: Wait, let me finish. – to the effect that once you become in the status that you are in, they have to seek – the Government has to seek to find a country for you, and I have seen cases where people have been held as long as nine years.

THE WITNESS: I know that, Your Honor.

THE COURT: And I don't know if any more than that, but I know I've seen at least one that came out of New York where Ex-Chief Judge Brown wrote the opinion – he used to be the chief judge with the Fifth Circuit; he was sitting by designation up in New York. And I'll have to go back and research it again, but I

[p.56] Zadvydas – Cross

know somebody was held at least nine years after finishing the sentence, and they couldn't do anything about it. They wrote a nice long opinion about how tough it was, but it's a legal issue, and I know it's also a constitution humanitarian-type thing that we're looking at. Nobody is – and that's what we're trying to find out, what, in fact, can be done. And I'm going to have to make a ruling. That's why we're having this hearing now, so it can be aired out, so I can really and I appreciate your answering –

THE WITNESS: I understand, Your Honor.

THE COURT: – as truthfully as you can, –

THE WITNESS: I understand, Your Honor.

THE COURT: – but we've got to try to dig into this and try to find what other options are available and whether or not the law is going to be favorable for a person situated like you, as to what we can do. And that's what we're trying to figure. I don't know yet. Go on, and answer as best you can. Put the questions to him.

MS. BECNEL: I don't have any further questions.

THE WITNESS: Well, I'd like to ask you. Can you answer me what efforts you've been making to try to deport me to a country? Have you been making any efforts since you stopped with the German Embassy and Lithuania? Did you stop –

[p.57] Zadvydas – Cross

MS. BECNEL: Again, that needs to – you need to communicate that with your deportation officer and

INS, as to your willingness to be deported to Russia, which we know of now and we've got INS sitting here. They can attempt to effect your deportation to Russia.

THE WITNESS: So, –

THE COURT: Let me say this to you all: –

THE WITNESS: – if I –

THE COURT: Just hold up one moment. – I don't know who you're going to call, but there is Government Exhibit 37, which shows – and you're correct the last effort I see here in this file is a letter coming from Director Caplinger, which is dated August 2nd, and you sent it to the Consulate General –

MR. BARNARD: What year, Your Honor?

THE COURT: 1996, August 2nd. It's Government Exhibit Number 37, where they were seeking travel documents for this man, but, again, from Germany. And, perhaps, he's correct, they haven't tried those other countries, and that's what Counsel is trying to say, they've never had the opportunity to try Russia.

A. And you – or if you know of any countries that would accept you. You keep saying you don't think anyone would accept you.

MR. BARNARD: Well, I think he testified that his

[p.58] Zadvydas – Cross

wife did try to bring him to the Dominican Republic.

THE COURT: He did say that. You're correct, Mr. Barnard. He did say that.

THE WITNESS: She tried with the Dominican Republic, because that's where my wife is from, you know, but – I don't see no other country that I can ask to be taken to. Canada, they'll say no, because it's too close to the border. Mexico, they'll say no, because it's too close to the borderline. So, what other country can I ask for?

MS. BECNEL: Canada and Mexico – any other countries, other than those, we can try to effect your deportation to those countries.

THE WITNESS: Well, then I'll say whichever country you can effect – I don't care. Choose a country, because I don't know, and I know they're not going to accept me. So, – there's no country going to accept me, I know it.

MS. BECNEL: I don't have any further questions, Your Honor.

THE COURT: Mr. Barnard.

MR. BARNARD: I'd just like some time to argue.

THE COURT: Well, I don't know if INS is going to make a presentation, other than their documents.

MR. BARNARD: Well, I'll wait until later, Your Honor.

MS. BECNEL: I don't think so.

[p.59] Zadvydas Redirect

THE COURT: Are you going to submit, based on your pleadings that you filed in the record?

MS. BECNEL: Yes, yes, Your Honor.

THE COURT: All right. Let the administrative record become a part of the record.

THE COURT: Now, I'll let you all argue on the case. Mr. Barnard, before he gets down, I want to make sure he says everything he wanted to say concerning this.

MR. BARNARD: Oh, I'm sorry; sit back down.

THE COURT: I don't know if he has anything else to say, because, you know, –

MR. BARNARD: I understand.

THE COURT: – because, you know, – I want him to say it. Because if you have something that the Court may have not asked you or your lawyer may have not asked you, sir, develop that.

* * *

REDIRECT EXAMINATION

BY MR. BARNARD

Q. The Government raised two new issues that we were sort of unaware of. They wanted to know if you would be willing to execute whatever documents for Russia and whatever documents maybe for the Dominican Republic –

A. I have no documents –

[p.60] Zadvydas – Redirect

Q. No, I'm saying, but if you would sign a form for them to check there, what are your feelings on that?

A. It doesn't matter to me, but the way I look at it, it's going to be Russia, then it's going to be this country, then this country, – how many countries do you have in this whole world? I figure it's going to go, just, from each country to each country to each country, and it's going to wind up where I'm going to be an old man when I get out. I'm 48 already.

Q. Well,

A. That is the way I look at it.

Q. – for the record, obviously you have more connections to Germany and to Lithuania –

A. Germany and Lithuania.

Q. – than Russia or the Dominican Republic.

A. Germany and Lithuania.

Q. Okay. Well, –

A. I wasn't born in Lithuania. I was born in a camp in Germany.

Q. Other than that issue, is there something else that you want to make the Judge more aware of, Mr. Zadvydas?

THE WITNESS: No, not recall, Your Honor.

THE COURT: The question – make it clearer, Mr. Barnard. Would you be willing to sign the necessary papers that would cause the INS to try to see a country for you, a

possible country for you to be deported to?

MR. BARNARD: Suppose Judge Moore gave them, like, a two month time limit –

THE WITNESS: If you gave them a time limit, Your Honor, yes.

MR. BARNARD: – or something to get a response –

THE COURT: Well, I don't know if I can give them a time limit, but I know one thing: They have to continue to make efforts to try to find a country to receive you.

THE WITNESS: I understand, Your Honor, –

THE COURT: And the latest one I see in this file was August the 2nd, 1996, –

THE WITNESS: I understand.

THE COURT: – but it went back to Germany, and I read that to you, that's Exhibit 37.

THE WITNESS: I understand, Your Honor, but they've been trying, now, for over two years to deport me to Germany or Lithuania.

THE COURT: But, Mr. Zadvydas, that's not the question. Even though you think it's a fatalistic attempt, we've got to try. But, under the law, they just can't release you. They've got to try to find somewhere for you. You know, and I understand what you're saying. You've been incarcerated, what, for two years past your –

THE WITNESS: Since '94.

[p.62] Zadvydas – Redirect

THE COURT: Okay, that's two years, then.

THE WITNESS: No, going on three years.

MR. BARNARD: Going on three, Judge.

THE COURT: Going on three? Okay.

THE WITNESS: Going on three years.

THE COURT: All right. Well, that's the question that your lawyer is putting to you: Are you willing to help them and to assist, by signing whatever documents are necessary to try to get you deported to a country, if they can find one that will accept you.

THE WITNESS: If one would accept me, of course.

THE COURT: That's what we're trying to find out.

THE WITNESS: If they would accept me, Your Honor.

THE COURT: I understand.

THE WITNESS: I mean, if they're not going to accept me, it's just a waiting game, you know. Are they going to hold me and hold me and hold me and hold me? I'm afraid I might not see my mother. She's 79 years old already. I haven't seen her since I've been locked up.

THE COURT: Yeah, I saw that in your papers. I read that in your handwritten petition. I went through that.

THE WITNESS: I don't understand none of this, because, you know, as sure I know, they will never deport me, and that will result in my lifelong incarceration. INS will never release me, so I'm condemned for the rest of my life,

[p. 63] Zadvydas – Redirect

locked up, because they say I'm an aggravated felon. The only one I aggravated was myself, nobody else.

THE COURT: I'm just looking to see if I have another question.

MS. BECNEL: Your Honor, –

THE COURT: Yes, ma'am.

MS. BECNEL: The INS has not attempted to effect his deportation to the Dominican Republic. That was done on behalf of his wife. That is something we can take up. If he's got an interest to go to the Dominican Republic, if he can provide any kind of documentation to help INS, –

THE WITNESS: I have no documentation from no country, no country at all; I'm stateless. I have no – the only documentation that I have is the German Birth Certificate that I sent to the German Embassy. I have no other documentations for no other country; none whatsoever. None. None at all. My wife is – that's the Dominican. She's my wife. I have nothing to do with that country. She was born there, not me.

THE COURT: Now, she's –

THE WITNESS: She tried –

THE COURT: – not an American citizen?

THE WITNESS: No, she's not, Your Honor. She's a permanent resident, –

THE COURT: Permanent resident, okay.

[p.80] Zadvydas Rebuttal

testimony on a limited basis.

KESTUTIS ZADVYDAS, PLAINTIFF, RESUMES STAND

* * *

REBUTTAL EXAMINATION

BY MR. BARNARD:

Q. You heard the mention made of you being interviewed and some review being made of your case. Would you just tell Judge Moore what you've experienced in the last two years, as far as being interviewed and having your case reviewed?

A. Well, since I've been – well, Oakdale, they see you over there, but since I've been in at Orleans Parish Jail, I have never talked to nobody, since I've been over there. It's almost a year now. I've talked to nobody over there.

Q. Okay, and what about reviewing your case? Do you know one way or the other if it's reviewed?

A. I have absolutely no idea.

Q. Okay. And your sister talked to an Immigration officer or somebody about –

A. In Oakdale, Louisiana.

Q. And what was she told –

A. She called up –

Q. – about you being reviewed?

A. – wanting to know my status, what my situation was, you know, what are they doing about my deportation and everything. She had a long conversation with them, and the deportation

[p.81] Zadvydas Rebuttal

officer, Mr. Kipp, his name was, he actually had my sister crying on the phone. He told my sister, "Don't even bother getting a lawyer. Your husband is going to be – your brother is going to be locked up for the rest of his life. We're never going to release him." And he also told my sister that, "How do I know he didn't murder a few people along the way?" That's exactly – I have a letter that my sister sent, a copy, a certified copy that she sent to Nancy Hooks. She sent it over there three times and the letter was refused three times. She wanted to lodge a complaint against the deportation officer in Oakdale, Louisiana.

MR. BARNARD: All right. Would you please answer the Judge's or the Government's questions they have?

THE COURT: Do you all have any cross-examination?

MS. BECNEL: I don't have any.

MS. BAKER: No.

THE COURT: All right. Thank you. (The witness is excused)

THE COURT: All right. Now, I'm going to take the matter under submission upon receipt of these supplemental briefs, which I will give you all a chance to file. They don't need to be that long. You know the issues that I need to know about. One, specifically, I want you to address is what is required to establish Mr. Zadvydas as a German national; his eligibility for bond, which we talked about,

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KESTUTIS ZADVYDAS	)	**No. 96-0810**
Plaintiff	)	**Section L**
VERSUS	)	
IMMIGRATION AND NATURALIZATION SERVICE, et al	)	
Defendants	)	

DECLARATION

I, Charles Jean, declare under penalty of perjury the following:

1). I am the Supervisory Deportation Officer of the Immigration and Naturalization Service (INS) facility in New Orleans, Louisiana District Office. As such, I have supervisory authority over all INS activities concerning deportation in the New Orleans District.

2). I make this declaration based upon my review of the file regarding Kestutis Zadvydas (A20 823 956), hereinafter referred to as "plaintiff".

3). Plaintiff was ordered deported on May 2, 1994.

4). On or about September 9, 1995, plaintiff was transferred from Oakdale, Louisiana to Orleans Parish Prison, New Orleans, Louisiana.

5). INS has made continuing efforts to obtain travel documents for plaintiff which would enable INS to effectuate his deportation.

6). As of this date, INS has been unsuccessful in obtaining travel documentation for plaintiff.

7). Plaintiff filed a Petition for Writ of Habeas Corpus requesting release from detention.

8). On October 3, 1996, I called the Lithuanian Consulate to determine how one obtains Lithuanian citizenship.

9). I was told that if plaintiff could prove that both of his parents were born in Lithuania prior to 1940, he would be able to derive Lithuania citizenship.

10). I was told that the Consulate was aware of plaintiff's case and that as of this date, plaintiff had not provided the documentation necessary to prove that his parents were born in Lithuania prior to 1940.

11). I was further told that once this information is provided to the Consulate, it would take approximately three (3) months to verify the information and issue a travel document.

12). Plaintiff was interviewed on this date. He was not in possession of his parents' birth certificates.

13). I have ordered the INS "A" files on plaintiff's parents to determine whether they contain a birth certificate or other documentary proof of the parents place and date of birth.

14). I intend to contact plaintiff's mother. As she frequently travels to Russia, she may be able and willing to assist us in obtaining her and her former husband's birth certificate.

15). I, through counsel, will inform this Honorable Court of any further developments as they occur.

I hereby declare under penalty of perjury that the above statements are true and correct to the best of my knowledge and belief.

10/3/96
Date

/s/ Charles Jean
CHARLES JEAN
Supervisory Deportation
Officer Immigration and
Naturalization Service

U.S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

[SEAL]

New Orleans District Office
701 Loyola Avenue, T-8011
New Orleans, La. 70113

October 3, 1996

Consulate of Dominican Republic
611 Gravier Street, Suite 1647
New Orleans, LA 70130

RE: Kestuties ZADVYDAS
A20 823 956

Dear Sir:

Please accept this letter with enclosed documents as a formal request for a travel document on behalf of Kestuties Zadvydas a citizen of Germany. Mr. Zadvydas wife Maria Zadvydas is a native of the Dominican Republic and now resides in Houston, Texas.

Mr. Zadvydas entered the United States at New York, New York, on December 6, 1956 as an immigrant.

Mr. Zadvydas was convicted in Supreme Court, Queens County, New York on August 17, 1992 for possession with intent to distribute cocaine. Mr. Zadvydas was sentenced to a term of 16 years and is presently in the custody of the Immigration Service.

On May 2, 1994 a Immigration Judge ordered Mr. Zadvydas deported from the United States.

Mr. Zadvydas will be scheduled to depart the United States upon receipt of a travel document.

If we may be of further assistance to you in this matter, please feel free to contact the Detention and Deportation Section at (504) 589-2801.

Sincerely,

/s/ John B. Z. Caplinger
John B. Z. Caplinger
District Director

MEMORANDUM

U.S. DEPARTMENT OF JUSTICE [SEAL]
Immigration and Naturalization Service
New Orleans District Office

Subject: Kestuties ZADVYDAS (A20 823 956)
Date: OCTOBER 3, 1996
To: File
From: Yolanda Jackson
Deportation Officer/NOL

On the above date I interviewed Mr. Zadvydas. He stated that this interview was a ploy because he went to court last week and stated no one from INS has spoke with him since he has been in Orleans Parish Prison. His mother is a naturalized citizen who is stateless (she has a sister in Russia who she visits every year). He stated that his wife has contacted the Dominican Republic Consul Office and they refused to issue a travel document. A formal travel document request will be submitted to the Dominican Republic Consul.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KESTUTIS ZADVYDAS	)	**No. 96-810**
Plaintiff	)	**SECT. L, MAG. 6**
VERSUS	)	
IMMIGRATION AND NATURALIZATION SERVICE, et al	)	
Defendants	)	

DECLARATION

I, Lynne Underdown, declare under penalty of perjury the following:

1). I am the Assistant District Director for Detention and Deportation of the Immigration and Naturalization Service (INS) facility in New Orleans, Louisiana District Office. As such, I have supervisory authority over all INS activities concerning detention and deportation in the New Orleans District.

2). I make this declaration based upon my review of the file regarding Kestutis Zadvydas (A20 823 956), hereinafter referred to as "plaintiff".

3). Plaintiff was ordered deported from the United States to Germany on May 2, 1994 by an Immigration Judge sitting in Oakdale, Louisiana.

4). Plaintiff did not appeal that decision. Instead, he filed a motion to reopen. However, that motion was denied on January 19, 1995 and no further judicial review

was sought. Therefore, the order of deportation is now final.

5). Because INS in Oakdale, Louisiana was unable to effectuate plaintiff's immediate deportation, plaintiff was moved to a long term detention facility. Consequently, plaintiff was transferred from Oakdale, Louisiana to New Orleans, Louisiana on or about September 19, 1995.

6). Orleans Parish Prison in New Orleans, Louisiana is used to house long term detainees until their deportation from the United States can be accomplished.

7). Immediately upon arrival in New Orleans, Louisiana, plaintiff's "A" file was assigned to a deportation officer who reviewed this case and assigned a callup date.

8). On September 30, 1996, President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996) (IIRIRA). In compliance with the Transition Custody Rules contained therein, plaintiff's file reviewed to assess his releasability.

9). After considering all of the plaintiff's aggravating and mitigating factors, a determination was made not to release him because INS considers plaintiff to be a threat to society as well as a flight risk.

10). Notwithstanding the above, INS will continue its efforts to effectuate plaintiff's deportation.

11). I, through counsel, will inform this Honorable Court of any further developments as they occur.

I hereby declare under penalty of perjury that the above statements are true and correct to the best of my knowledge and belief.

January 6, 1997
Date

/s/ Lynne Underdown
LYNNE UNDERDOWN
Assistant District Director
for Detention and
Deportation Immigration
and Naturalization Service

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KESTUTIS ZADVYDAS	*	CIVIL ACTION
VERSUS	*	NO. 96-0810
JOHN B.Z. CAPLINGER	*	SECTION: "L"(6)

REPORT AND RECOMMENDATION

This matter was referred to the United States Magistrate Judge for the purpose of conducting a hearing, including an evidentiary hearing, if necessary, and submission of proposed findings and recommendations for disposition pursuant to Title 28, United States Code, Sections 636(b)(1)(B) and (C), and, as applicable, the law governing cases filed pursuant to Title 28, United States Code, Section 2241.

Upon review of the entire record and after conducting an evidentiary hearing on September 27, 1996, the magistrate judge issues this Report and Recommendation in accordance with the applicable law, thereby recommending that Kestitus Zadvydas' application for a writ of habeas corpus be DENIED.

In the instant application for habeas relief, petitioner Kestitus Zadvydas claims that the respondents have denied and continue to deny him due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution because of his continued incarceration, even though he has completed serving his sentence on a criminal conviction. Petitioner has been incarcerated for approximately thirty-six months awaiting deportation. Thus, the question presented is whether

petitioner can be detained indefinitely pending his deportation as an aggravated felon alien without violating the Due Process Clause.

Petitioner is not a native and citizen of the United States. He entered the United States on December 6, 1956, at New York, New York, as an immigrant. On December 8, 1966, petitioner was convicted in the New York Supreme Court, Queens County, on the offense of attempted robbery, third degree. On February 7, 1974, petitioner was convicted in the New York Supreme Court, Kings County, for the offense of attempted burglary, third degree. Petitioner was sentenced to one and one half to three years imprisonment. On August 17, 1992, petitioner was convicted in Circuit Court of Fairfax County, Virginia for the offense of possession of a controlled drug (cocaine) with intent to distribute. Petitioner was sentenced to serve sixteen years, with six years suspended. This drug trafficking offense is an aggravated felony.

The Immigration and Naturalization Service (INS) issued an Order to Show Cause (OSC) on July 6, 1977, charging the petitioner as deportable under Title 8; United States Code, Section 1251 (a) (4).[1] On July 13, 1977, petitioner was granted release on recognizance and allowed to remain at large pending disposition of his deportation case. Petitioner's application for relief from

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[1] This section has been redesignated and renumbered as Title 8, United States Code, Section 1251(a) (2) (A) (ii) and charges an alien as deportable at any time after entry for having been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

deportation pursuant to Title 8, United States Code, Section 1182 (c) was administratively denied due to the petitioner's past criminal history.

In July 1982 the INS notified the petitioner that his hearing before an immigration judge had been rescheduled to August 25, 1982. Petitioner failed to appear for his August 25, 1982, hearing. The INS instituted procedures to locate him. All attempts to locate the petitioner were unsuccessful until 1992 when the petitioner turned himself in to the police in Houston. Petitioner was removed to Virginia where he faced the drug charges which led to his drug trafficking conviction on August 17, 1992.

Petitioner served two years of his sentence and was released on parole in January 1994. However, he was immediately taken into custody by the INS. The INS commenced deportation proceedings against the petitioner once again by issuing a superseding OSC on January 24, 1994. The OSC charged that petitioner was deportable under Title 8, United States Code, Sections 1251 (a) (2) (A) (ii) (convicted of two crimes involving moral turpitude) 1251 (a) (2) (B) (i) (convicted of a violation of law relating to a controlled substance) and, 1251 (a) (2) (A) (iii) (convicted of an aggravated felony).

Petitioner was detained without bond based upon his conviction for an aggravated felony. A bond redetermination hearing was held before an immigration judge on February 28, 1994. The immigration judge ordered that the petitioner's request for a change in his custody status be denied and that he remain detained without bond. The

immigration judge found the petitioner could not demonstrate that he was likely to appear for future immigration hearings based on his past failure to appear in court and his flight from prosecution in Virginia. On March 10, 1994, petitioner appealed the immigration judge's decision to the Board of Immigration Appeals (BIA) . The BIA agreed with the decision of the immigration judge and dismissed the petitioner's appeal.

A hearing was conducted on March 29, 1994, regarding petitioner's deportability. Petitioner admitted all of the allegations of fact contained in the superseding OSC and was found to be deportable as charged. Seeking relief from deportation, the petitioner applied for a waiver under Title 8, United States Code, Section 1182(c) of the Immigration and Nationality Act.

The immigration judge conducted a hearing on April 26, 1994, and determined that the positive factors did not outweigh the serious negative factors in the case. The immigration judge denied petitioner's application for relief. He also ordered petitioner be deported from the United States to Germany.[2]

On May 5, 1994, the INS Officer-in-Charge (OIC) at Oakdale, Louisiana forwarded a formal Written request for a travel document to the Consulate of General of the Federal Republic of Germany (CGFRG). On May 18, 1994, the CGFRG responded by providing an application which petitioner needed to complete in order to obtain a travel document.

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[2] At the time, it was believed that petitioner was a citizen of Germany.

The INS Deportation Officer forwarded the completed application to the CGFRG on June 14, 1994. On June 28, 1994, the CGFRG determined that: (1) Petitioner was born of Lithuanian parents; (2) petitioner was not a German citizen; and, (3) no passport from Germany could be issued for petitioner.

The Oakdale OIC forwarded a formal written request for a travel document to the Consulate General of Lithuania on July 26, 1994. The Consulate General of Lithuania responded on August 22, 1994, by refusing to issue a travel document for petitioner.

On September 21, 1994, the OIC forwarded correspondence to the Immigration and Naturalization Service Headquarters in Washington, D.C. and to Interpol requesting assistance in obtaining a travel document for petitioner. In turn, the Assistant Commissioner of Detention and Deportation in Washington, D.C., on October 3, 1994, requested permission for the return of the petitioner to Lithuania.

On or about December 21, 1994, petitioner, represented by counsel, filed a motion to reopen his deportation case. On January 19, 1995, the immigration judge denied the petitioner's motion to reopen based on the petitioner's failure to provide a relief application as required by Title 8, C. F. R., Section 3.23 (b) (1) and failure to make a prima facie showing of eligibility for relief from deportation.

The OIC forwarded a second formal written request to the CGFRG for a travel document for petitioner on January 24, 1995. The OIC forwarded the third formal

written request to the CGFRG for a travel document for the petitioner on March 14, 1995.

On March 21, 1995, the OIC forwarded identity documents on the petitioner and a money order to the CGFRG in order to expedite issuance of the petitioner's travel document. The CGFRG responded by requesting further information about petitioner, his parents and former domicile in Germany.

The OIC provided written answers to the questions raised by the CGFRG. On May 12, 1995, the CGFRG wrote to the OIC stating that after extensive research it had been determined, that the petitioner does not hold German citizenship. On May 22, 1995, the CGFRG wrote that the petitioner was born in a displaced persons camp in Germany but that the camp was possibly governed by the United States. The OIC issued a fourth formal written request to the CGFRG for a travel document for the petitioner.

Positions of the Parties

The basis for petitioner's request for *habeas corpus* relief is that he is now being detained unconstitutionally or illegally, pending deportation. Originally, petitioner claimed he was entitled to a bond and release from Immigration custody because his order of deportation was issued more than six months ago, and INS has been unable to effectuate his deportation from the United States to Germany, Lithuania or any other country. Petitioner now argues in his recently filed (October 11, 1996) memorandum that he is entitled to habeas corpus relief because: (1) he never made a knowing waiver of his

constitutional rights (i.e., right to obtain counsel, right against making admissions and right to have relatives appear on his behalf at hearings); (2) his detention violates international law; (3) his detention violates principles of due process; (4) his incarceration for life violates the Eighth Amendment's prohibition against cruel and unusual punishment and, (5) Section 440 (c) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) violates his right to both substantive and procedural due process; or alternatively, Section 440(c) does not apply to petitioner because it should not be applied retroactively.

It is the position of the Immigration and Naturalization Service (INS) that it has the legal authority to detain petitioner and that he is being detained pursuant to that authority. The INS argues that petitioner's detention is statutorily authorized by the Immigration and Nationality Act and does not offend any constitutional protection applicable to petitioner. The INS also contends that Section 440(c) of the AEDPA, authorizes and further requires, that petitioner be detained during the pendency of the deportation proceedings against him.

Indefinite Detention Pending Deportation – Due Process

Petitioner claims that the Immigration and Naturalization Service (INS) is incorrect in its finding that he should not be allowed to be released on bond pending his deportation. Having reviewed the evidence submitted and the applicable law, the court finds that petitioner's continued detention is statutorily authorized and does

not constitute an abuse of the Attorney General's broad discretion in immigration matters.

At the outset, the court notes that petitioner is properly classified as a convicted aggravated felon because of his controlled substance violation. See, 8 U.S.C. § 1101(43). Petitioner does not challenge this finding.

The Immigration and Nationality Act ("INA") authorizes the Attorney General, on behalf of the Immigration and Naturalization Service, to take an alien into custody pending deportation. *See generally,* 8 U.S.C. § 1252. Section 1252 (a) (2) (A) of the Act specifically provides for the detention of aggravated convicted felons, as follows:

> The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) but subject to subparagraph (B), the Attorney General shall not release such felon from custody.

Paragraph (B) then provides:

> The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

The language of Section 1252 (a) (2) (A) and (B) thus contrasts with the general custody provision set forth in section 1252(a)(1) which provides that potentially deportable aliens may, in the discretion of the Attorney General, be released on bond or supervised parole. In standard bond proceedings under Section 1252 (a) (1), an alien generally should not be detained pending deportation "except on a finding that he is a threat to the national security or is a poor bail risk". *Matter of Ellis*, 1993 WL 65657 (BIA 1993). Thus in general bond proceedings, the burden falls upon the INS to establish that a petitioner should not be released on bond.

Such is clearly not the case when the alien sought to be deported is an aggravated convicted felon. In this instance, the language of Section 1252 (a) (2) (A) and (B) allots the burden of proving entitlement to bond to the petitioner. *Accord, Tran v. Caplinger*, 847 F.Supp. 469 (W.D. La. 1993) (holding that Section 1252(a)(2) creates a rebuttable presumption against the release of any alien who is convicted of an aggravated felony). *See also, Matter of Ellis, supra.*

Thus, in order to be eligible for release, petitioner must show that he is a lawfully admitted alien, that he is not a threat to the community, and that he is likely to appear at any scheduled hearings. In this case, petitioner has established that he was lawfully admitted to this country; as to the other two requirements, however, petitioner has not met his burden of proof. Considering petitioner's recidivist history and his prior episode of "bond jumping", petitioner has not met his burden of proving that he is not a threat to the community and that he is likely to appear for scheduled hearings.

Petitioner claims that his continued detention pending his deportation violates his right to due process. He argues that as a result of his status as a convicted aggravated felon, he could actually serve what may amount to a life sentence while he awaits deportation.

An alien's rights to remain in the United States are governed by the terms set by Congress. *See Fiallo v. Bell*, 430 U.S. 787, 792, 97 S. Ct. 1473, 52 L. Ed. 2d 50 (1977) . The INS argues that 8 U.S.C. § 1252(a)(2) was enacted for the facially legitimate governmental purpose of preventing "bond jumping criminal-aliens" from further victimizing the community. As such, outside of a finding that the agency's decision to deny petitioner release on bond was made arbitrarily[3] or for a punitive purpose, the INS asserts that this court must find petitioner's continued detention constitutional. The INS' position is well taken.

The Fifth Amendment's mandate that "no person shall . . . be deprived of life, liberty or property, without due process of law" extends due process protection to persons within the territorial United States and not just to U.S. citizens. *See, Plyer v. Doe*, 457 U.S. 202, 210-12, 102 S.Ct. 2382, 2391-92, 72 L.Ed.2d 786 (1982); *Wong Wing v. United States*, 163 U.S. 228, 237-238, 16 S.Ct. 977, 981, 41 L.Ed. 140 (1896). Due process protection has both substantive and procedural aspects. Substantive due process prevents the government from engaging in conduct that "shocks the conscience", *Rochin v. California*, 342 U.S. 165,

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[3] For the reasons discussed, *infra*, relative to petitioner's eligibility for bond, the court finds that the INS has not acted arbitrarily in denying petitioner release on bond.

172, 72 S.Ct. 205, 209, 96 L.Ed.2d 183 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325-326, 58 S.Ct. 149, 152, 82 L.Ed.2d 288 (1937). Procedural due process concerns itself with guaranteeing that the government process used in denying an individual of life, liberty, or property is implemented in a fair manner. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). In arguing that the length of his detention (a denial of petitioner's asserted "liberty" interest) "shocks the conscience", Zadvydas primarily attacks the substantive nature of the alleged constitutional violation.

The constitutionality of detention must be considered in light of its purpose. In evaluating the question of whether an alien's prolonged administrative detention violated due process, the Fifth Circuit has indicated that the focus must be on "whether the detention is imposed for the purpose of punishment or whether it is merely incidental to another legitimate governmental purpose." *Gisbert v. United States Attorney General*, 988 F.2d 1437, 1441 (5th Cir. 1993), citing *Schall v. Martin*, 467 U.S. 253, 268-69, 104 S.Ct. 2403, 2412, 81 L.Ed.2d 207 (1984). Absent "any expression of intent to punish on the part of the government, that determination will generally turn on 'whether an alternative purpose to which (the detention) may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned (to it).' " *Id.* at 1441-42, citing *Schall*, 467 U.S. at 268-69, 104 S.Ct. at 2412.

The court's research reveals only one other case addressing the issue of whether a non-excludable alien's continued and indefinite detention pursuant to 1252 (a)

(2), as amended in 1990, constitutes punishment, thus violating due process. *See, Tran v. Caplinger*, 847 F.Supp. 469, 475-76 (W.D.La. 1993) The *Tran* court, relying on the Fifth Circuit's reasoning in *Gisbert*,[4] found that the alien's detention was not punishment which would then offend the alien's due process rights. *Id.* This court finds the reasoning applied in *Tran* persuasive.

In *Tran*, the court found that the legislative history and text of Section 1252 of the Immigration and Nationality Act indicated that the statute was clearly not intended as punishment. Rather, the purpose of the detention prescribed is to "protect the community and also to prevent aliens from absconding before deportation." *Id.* at 475. The government's interest in safeguarding the community is both legitimate and compelling. *Id.* at 474, *citing United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987). Moreover, "[d]etention in order to insure that the petitioner would not abscond also serves a legitimate governmental

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[4] In *Gisbert*, the Fifth Circuit held that the continued INS detention of an excludable alien was not punishment amounting to a violation of substantive due process as the INS' interest in protecting society from potentially dangerous aliens was a rational, non-punitive purpose for detention. *Gisbert*, 988 F.2d at 1442. *See also, Barrera-Eschavarria v. Rison*, 44 F.3d 1441 (9th Cir.), *cert. denied*, 116 S.Ct. 479, 133 L.Ed.2d 407 (1995) (holding that indefinite detention of excludable aliens did not violate substantive due process given the government's legitimate interest in protecting its citizens against criminal aliens).

interest". *Id., citing Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).[5]

Additionally, in determining that the continued detention of an alien was not an excessive means of accomplishing the government's purpose, the *Tran* court recognized the heightened interest of Congress in immigration matters[6] and noted that the INS had limited application of Section 1252(a)(2) detention to those aliens who have already been judicially determined to have committed a felony. *Id.* at 475. In *Alvarez-Mendez v. Stock*, 941 F.2d 956, 959 (9th Cir. 1991), *cert. denied sub nom., Alvarez-Mendez v. Henry*, 506 U.S. 842, 113 S.Ct. 127, 121 L.Ed.2d 82 (1992), the Ninth Circuit found that the detention of an alien was not an excessive means of accomplishing Congress' purpose of protecting society from dangerous aliens when the alien was not immediately removable from the United States. The Fifth Circuit has applied the rationale of *Alvarez-Mendez* in *Gisbert*.

The petitioner argues that resident aliens such as himself are entitled to greater protections than excludable aliens such as those in *Gisbert, supra*. Petitioner's general

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[5] *See also, Doherty v. Thornburgh*, 750 F. Supp. 131, 137 (S.D.N.Y. 1990), *affirmed*, 943 F.2d 204 (2d Cir. 1991), *cert. dismissed*, 503 U.S. 901, 112 S.Ct. 1254, 117 L.Ed.2d 485 (1992) finding that "[d]etention pending deportation is regulatory not punitive".

[6] Congressional power over immigration and naturalization matters is plenary; subject to only limited judicial review. *Fiallo*, 430 U.S. at 792, 97 S.Ct. at 1477. In exercising its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens". *Mathews*, 426 U.S. at 80, 96 S.Ct. at 1891.

assertion that excludable aliens are not entitled to the same constitutional protections given to resident aliens is accurate. *See, Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir. 1984) (en banc), *cert. granted, judgment affirmed*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985). However, the determination of whether detention is punitive turns not on an alien's status as excludable or deportable but rather upon the governmental purpose behind the detention. *See, Gisbert*, 988 F.2d at 1441-42. Petitioner fails to explain why the government purpose served by Section 1252(a)(2) of the INA, i.e., protection of society and controlling "bond jumping", should be considered punitive for excludable aliens but not for one-time resident aliens now considered deportable as aggravated felons.

If a particular condition or restriction of detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment. *Bell*, 441 U.S. at 38, 99 S.Ct. at 1874. In petitioner's case, as with the aliens in *Gisbert*, detention is mandated by virtue of the alien's inability to establish that he would not pose a continuing threat to society and would not escape from parole supervision, the same dual objective which Congress sought to obtain with the enactment of Section 1252(a)(2). This court finds no basis for drawing the distinction based on alien status which Zadvydas wishes the court to draw. Petitioner fails to show that his continued detention is punitive; thus, his substantive due process claim is without merit.

Waiver of Constitutional Rights

Petitioner claims he never made a knowing waiver of his constitutional rights (i.e., right to obtain counsel, right against making admissions and right to have relatives appear on his behalf at hearings) during his deportation proceedings which were conducted on March 29, 1994, and April 1, 1994. On May 2, 1994, the immigration judge issued his opinion ordering petitioner deported. Petitioner claims that a resident alien, as petitioner was, is entitled to the full protection of the Fifth and Fourteenth Amendments protections, relying on *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 at n.5, 73 S.Ct. 472, at n.5, 97 L.Ed.2d 576 (1953). Therefore, a resident alien cannot be expelled from this country without allowing him or her a fair hearing. *Id.* at pp. 598 & 598 at n.7. Moreover, petitioner claims that his deportation hearing did not comport with the requirements of due process and fundamental fairness.

Petitioner acknowledges that deportation proceedings are civil and not criminal in nature. However, petitioner argues that since his incarceration has resulted from the deportation proceedings then criminal law principles should apply.[7]

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[7] Petitioner likens his waiver of rights in the administrative hearing to those waived by a criminal defendant in a guilty plea. The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 369, 88 L.Ed.2d 203 (1985) *citing North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed. 162 (1970) (other citations omitted).

Review of the INS administrative record shows that petitioner participated in his deportation proceeding knowingly, voluntarily and intelligently. In fact, petitioner was specifically told that he had a right to counsel and he was advised about the ramifications and possible consequences of his admissions as demonstrated from the colloquy between petitioner and the immigration judge as follows:

("J" Judge; "Z" = Zadvydas; "R" = Ms. Richard)

J. Now, the purposes of this hearing is to determine whether or not you may remain in the United States. During the hearing you're entitled to be represented by an attorney. If you cannot afford to hire an attorney at your own expense I do not have the authority to appoint one to represent you. However, there are lawyers in the area who have agreed to provide free legal services in certain cases and one of those

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In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the United States Supreme Court held that by entering a plea of guilty, a defendant waives several federal constitutional rights. *Boykin*, 395 U.S. at 243. The Fifth Circuit has consistently held that express articulation and waiver of each of these rights are not required; however, the record must show that the plea was voluntary. *Neyland v. Blackburn*, 785 F.2d 1283, 1287 (5th Cir.), *cert. denied*, 479 U.S. 930, 107 S.Ct. 399, 93 L.Ed.2d 352 (1986), *citing Brown v. Jernigan*, 622 F.2d 914, 915 (5th Cir.), *cert. denied*, 449 U.S. 958, 101 S.Ct. 368, 66 L.Ed.2d 224 (1980).

If a defendant "understands the nature of the charges against him and the consequence of his plea, yet voluntarily chooses to plead guilty, that plea should be upheld on federal review." *Diaz v. Martin*, 718 F.2d 1372, 1377 (5th Cir. 1983), *cert. denied*, 466 U.S. 976, 104 S.Ct. 2358, 80 L.Ed. 2d 830 (1984).

lawyers will represent you at little or no cost. Do you understand your right to be represented?

Z. Yes sir.

J. Very good. Would you like to postpone the hearing and have some time at which to look for a lawyer or would you prefer to speak in your own behalf and being the hearing today?

Z. Well, I really can't afford one.

J. Well did you understand what I explained about there being lawyers in the area that would represent you without paying a fee?

Z. Yes sir.

J. Would you like an opportunity to contact any of them?

Z. No sir.

J. Very well, did you receive from the immigration service a copy of the Order to Show Cause. That is the paper on which the government makes the charges about you. It would look like that paper that Ms. Richard is showing you – you did - very good. That will be received into the record as Exhibit #1. Did you also receive a list of the free legal services available in the area and the notice of your appeal record?

Z. Yes sir.

J. Very good. During the hearing which we will conduct, you are permitted to offer evidence in your behalf, to examine and object to any evidence offered by the government and if the government should call witnesses to testify in your case, you are permitted to ask questions of their witnesses. That is known as cross-examination. Do you understand these rights that I have explained?

Z. Yes sir.

J. Very good – now I will explain the charges that the government makes and ask you some questions about them. The law says that first you must take an oath to answer the questions truthfully, so I will ask you to please stand and raise your right hand to be sworn. Do you solemnly swear that the testimony you will give in this proceeding will be the truth, the whole truth and nothing but the truth, so help you God.

Z. I do.

J. Thank you. Now please be seated. Now the government alleges that you are not a citizen or national of the United States but rather a native and citizen of Germany. Is that correct?

Z. Yes sir.

J. They allege that you entered the United States through New York, New York, on December 6, 1956. Is that correct?

Z. Yes sir.

J. They allege that at that time you entered the United States as an immigrant. That is, a permanent resident or person with a green card. Is that right?

Z. Yes.

J. They also allege that on December 8, 1966, you were convicted in the state of New York for the offense of attempted robbery in the third degree. Is that correct?

Z. Yes sir.

J. OK, they next allege that on February 7, 1974, you were convicted in the State of New York for the offense of attempted burglary in the third degree. Is that correct?

Z. Yes sir.

J. And finally they allege – actually it's not finally, excuse me. The next thing that they allege is that on August 17, 1992, you were convicted in the State of Virginia for the offense of possession of a controlled drug with intent to distribute. Is that correct?

Z. Yes sir.

J. What drug was involved?

Z. Cocaine.

J. I see. And the final thing that they allege is that these crimes did not arise out of a single scheme of criminal misconduct. What they mean by that is that when you committed an offense in 1966 you did not have in mind that you would be committing another one in 1974. Is this correct?

Z. Yes sir.

J. Very good thank you for the information. Now Ms. Richard I consider all the allegations to be admitted. Is there any evidence that the service wishes to offer? Or stand on the plea?

Z. At this time (inaudible) will stand on the plea.

J. Very well – to the respondent, based upon what you've told me I find that you are subject to being deported. We'll discuss the possibility of relief from deportation in just a moment. Before we do that I want to explain to you that those within deportation proceedings are permitted to choose the country to which their deportation would be directed. If you had to be deported, to what country would you choose to go?

Z. I can't answer that your honor.

J. You may decline the designated if there is no country; I will then have to designate one for you and I will designate your native country of Germany. Now on the subject of relief of deportation, is the reason you don't choose to go to Germany simply because you've not lived there in a long time?

Z. Well I've been here since 1956 your honor and I don't know anything about Germany.

J. I understand. My point is that you don't fear that the government of Germany would persecute you in some way do you?

Z. No sir.

J. OK, then it would look like that the relief that would be available to you would be in the form of a waiver under Section 212(c) of the Immigration and Nationality Act. That could allow you to remain, of course, you also could now that I think about it, since you've been here for so long, I think you could also apply for registry if I'm not mistaken. I have to do a little research on that to see whether you're eligible for that or not. Would it be agreeable to you if we could postpone the hearing for a few days so that I could have the opportunity to check on that.

J. Very good, let me go off the record for a moment while I get a date from the clerk.

J. Back on the record now – we're going to postpone your hearing for three days – we'll have you back this Friday, April 1st at 10 in the morning. Between now and then I'll be able to check on that possibility of registry to see if that is available to you and if it is I can get the forms together for you. If it's not I'll have the forms for the 212 (c) waiver. I assume you want to apply for relief and stay if you can, right?

Z. Yes sir.

J. OK fine – then that's what we'll do. The matter will continue to April 1st and we're off the record until then.

Record Document, Transcript of Proceeding conducted on March 29 and April 1, 1994.

Further review and study of the administrative record (Transcript of Cassette Tape #1, March 29, 1994, hereinafter T.___) shows that petitioner voluntarily and knowingly rendered his admissions (T. 2-5). Petitioner and the judge discussed petitioner's family ties (T. 8-11), employment history (T. 13-15) and criminal history (T. 17-23). Study of the transcript of Cassette Tape #2 shows that the following subjects were discussed: petitioner's previous immigration detention (T. 1); petitioner's incarceration and escape (T. 2-7); petitioner's life in Houston, Texas (T. 8-10); petitioner's previous guilty pleas (T. 14); petitioner's education (T. 15-16); petitioner's family ties (T. 18); and, handwriting (T. 20).

Review of the cassette tapes and transcripts of the tapes of the deportation proceedings conclusively shows that petitioner's rights were protected. Petitioner's claim is meritless.

International Law and Eighth Amendment

Petitioner argues that "no principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment." Petitioner argues that the United Nations' charter calls upon the United Nations to promote the protections of human rights and for its member nations to undertake joint and separate action to achieve that goal. Petitioner relies upon

Caballero v. Caplinger, 914 F.Supp. 1374, 1379 (E.D.La. 1996) citing 59 Stat. 1033, T.S. No. 993 (1945); U.N. Charter, Arts. 55 & 56.

As previously discussed, petitioner is not being arbitrarily imprisoned for an indefinite time period amounting to a life sentence.[8] The INS is continuing its efforts to deport petitioner. On October 3, 1996, the INS forwarded a formal request for a travel document on behalf of petitioner to the Dominican Republic, the native country of petitioner's wife.

The government has a legitimate interest in protecting its citizens from criminal aliens. There has been no violation of international law. The court notes that cases exist whereby aliens have been detained for longer periods than petitioner. *See, Dor v. District Director, INS*, 891 F.2d 997 (2d Cir. 1989) (five year detention); *Doherty v. Thornburg*, 943 F.2d 204 (2d Cir. 1991) (eight year detention).

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[8] The Court notes at this juncture that, according to the INS' Second Supplemental Memorandum, Zadvydas can apply for a bond redetermination pursuant to the "transition period custody rules" of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996) (hereinafter "IIRIRA"). These transitional rules delegate authority to the Attorney General to release certain criminal aliens, including aggravated felons who are undergoing deportation or exclusion proceedings, from INS custody on "bond". Although the INS asserts that this change in the law renders petitioner's application moot, the Court has been informed by telephone by counsel for the INS that even under the more lenient transitional rules, the INS has determined that petitioner would not be eligible for release on bond. Therefore, the Court has addressed the merits of petitioner's complaints.

To the extent that petitioner claims that his continued detention violates the Eighth Amendment, the claim has no merit. The Eighth Amendment guarantees that persons will not be subject to excessive bail and fines or cruel and unusual punishment, but does not preclude the detention of potentially dangerous aliens. *United States v. Salerno*, 481 U.S. 739, 748, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

Antiterrorism and Effective Death Penalty Act of 1996 (ARDPA Pub.L. 104-132, 110 Stat. 1214 (1996)

Finally, the INS argues that petitioner is not entitled to relief under the AEDPA and further asserts that the AEDPA should apply to petitioner's case retroactively. Petitioner claims, however, that Section 440 of the AEDPA violates his right to substantive and procedural due process and, alternatively, that Section 440 should not be applied to his case retroactively.

This Court has already determined, applying pre-AEDPA law, that petitioner is not entitled to be released from INS detention. Therefore, the Court declines to address whether the AEDPA violates due process or should be applied retroactively to petitioner's case.

Accordingly,

IT IS RECOMMENDED that petitioner's application for habeas corpus relief pursuant to Title 28, United States Code, Section 2241 be DENIED.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within 10 days

after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected – to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1430 (5th Cir. 1996).

New Orleans, Louisiana, this 3rd day February, 1997.

/s/ LOUIS MOORE, JR.
United States Magistrate Judge

To whom it may concern:

I Ona Steponis, declare under penalty of perjury the following:

I am the mother of Kestutis Zadwydas. I was born in Germany, 1919. My mother and father were not German citizens. They were Lithuanians. I never derived any citizenship of either country. After World War II, my husband and I fled Lithuania to avoid prosecution by the communists. We went to Germany and were put in a DP camp. My son Kestutis was born in that camp, which at that time, was governed by the United States following World War II. My entire family and I came to the United States December 6, 1956. My status and nationality, along with my sons and daughters was stateless. When I became a nationalized citizen in 1982, it clearly states on my certificate of naturalization, "country of former nationality – STATELESS". Since I have been living here, in the United States, at 58 Van Nostrand Avenue, Great Neck, NY (for the past 25 years), not once did the INS contact me concerning my place of birth, nor my son Kestutis Zadwydas. I have sent my son documents concerning my place of birth. I hope and pray that these documents can, in some way, help him to be released so that he can be with the family again, who love and miss him very much.

/s/ Ona Steponis
Ona Steponis
58 Van Nostrand Avenue
Great Neck, NY 11024
State of New York
County of Queens: ss
Sworn to Before me this
9th day of April, 1997

/s/ Nicholas Messina
NICHOLAS MESSINA
NOTARY PUBLIC, State of New York
No. 41-7911751
Qualified in Queens County
Commission Expires Nov. 30, 1998

To whom it may concern:

I Aldona Terry Smith, formerly Aldona Terry Rios, declare under penalty of perjury the following:

I am the sister of Kestutis Zadwydas. When my brother was released on his own recognizance from the INS in 1977, he lived with me at 1663 Hancock Street, Ridgewood, NY from 1977 – 1981. During that time, I have never received a letter from the INS concerning my brother's next scheduled deportation hearing. When I moved in 1981, I notified the US Post Office of my new address, therefore, they would have forwarded any mail addressed to me to my new address at 66-67 Forest Avenue, Ridgewood, NY. During the time I resided at that address, again, I never received anything from the INS concerning my brother Kestutis Zadwydas.

/s/ Aldona Terry Smith
Aldona Terry Smith
62-22 69th Lane
Middle Village, NY 11379
State of New York
County of Queens: ss
Sworn to Before me this
9th day of April, 1997

/s/ Nicholas Messina
NICHOLAS MESSINA
NOTARY PUBLIC, State of New York
No. 41-7911751
Qualified in Queens County
Commission Expires Nov. 30, 1998

U.S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
[SEAL]

New Orleans District Office
701 Loyola Avenue, T-8011
New Orleans, La. 70113

April 23, 1997

Darius Gaidys
Consul
Consulate General of Lithuania
420 - 5th Avenue - 3rd Floor
New York, NY 10018

Dear Mr. Gaidys:

By letter dated July 26, 1994, (copy enclosed), we requested a travel document on behalf of Kestuties Zadvydas, A20 823 956.

By letter dated August 22, 1994 (copy enclosed), you stated that the Consulate General could not issue a travel document to Mr. Zadvydas "since he is neither citizen nor permanent resident of the Republic of Lithuania."

This service understands that Mr. Zadvydas is not a permanent resident of Lithuania and has probably never resided in your country. However, the basis for the determination that Mr. Zadvydas is not a citizen of Lithuania was not explained.

As you know, Mr. Zadvydas was born at a time when most of Europe was trying to overcome the terrible ravages of war. Many families had fled or been forced from their homes and countries and many lost all of most of their property and personal belongings.

The record reflects that Mr. Zadvydas was born in Germany in 1956 of parents both of whom were citizens of Lithuania.

It would be appreciated if you would provide a copy of your country's law which sets forth how a child born in another country of Lithuanian citizen parents acquires citizenship. Surely, a child is entitled to citizenship of the country of birth or country of parents.

The Vice Consul of the Embassy of Germany has explained that citizenship of children born in Germany is determined by the citizenship of the parents, through the father only until 1975 when it was changed to either or both parents.

Mr. Zadvydas has provided additional documents obtained from his family, copies of which are enclosed. The documents appear to be a baptismal certificate relating to his mother and three statements regarding the marriage of his parents in Lithuania.

We are enclosing a new Form I-217, Information for Travel Document or Passport, which includes newly acquired information about Mr. Zadvydas. It is requested that you reconsider our request for a travel document for Mr. Zadvydas.

Your early response would be appreciated as Mr. Zadvydas is being detained. Your reply can be telefaxed to 504-589-2504. If you have any questions or need further

information concerning this case, please call me at 504-589-6521.

Sincerely,

/s/ Shirley Epperson
Shirley A. Epperson
Deputy District Director
Enclosures

Date Prepared: 04-22-97
INFORMATION FOR TRAVEL DOCUMENT OR PASSPORT

File: A 20 823 956

1) Name: ZADVYDAS, Kestuties

2) Sex: Male

3) Other Names Used or Known By: CADARDS, Kestuties

4) Citizenship: Lithuania

5) Date of Birth: 11/21/48

6) Place of Birth: Schwaebisch Gmuend, Germany

7) Height: 72"
Weight: 180
Eyes: Blue
Hair: Brn
Complexion: light
Marks or Scars: Scorpion tattoo r/arm & rose l/arm

8) Nearest Large City to Place of Birth: Munich, Germany

9) Distance and Direction of Place of Birth From This Large City: Not applicable

10) If Citizenship is Different From Country of Birth, Explain. If Naturalized In Any Country, Show Date And Place Of Naturalization, Certificate Number, And State How Citizenship Was Acquired: Lithuanian through parents both of whom were citizens of Lithuania

11) Names: Locations And Dates (Years) Of Attendance Of Foreign Schools: Came to U.S. when 8 years old with parents and siblings

12) Names, Exact Locations And Dates (Years) of Attendance of Foreign Churches, Include Date And Nature Of Any Religious Ceremony Which May Have Been Recorded: Baptism of mother – Catholic parish, Memel (now Klaipeda), Marriage of parents – Catholic parish priest in Garsdai, Lithuania

13) Last Permanent Residence In Country Of Citizenship (*Show Dates Of Residence*): None Known

14) Address In Country Of Last Foreign Residence (*Show Dates Of Residence, And Immigration Status There*): Goeppingen, Germany Staatl Wohnheim 5/8

15) Place Of Entry Into United States: New York, New York (Immigrant)

Date Of Entry Into United States: 12/6/56

16) List Date And Place Of Issuance And Number Of Passport, Birth Certificate, Baptismal Certificate Or Document Of Identity. Specify Dates Of Military Service, Country And Unit, Rank, Serial Number, And Places Of Induction And Discharge.: Immigrant visa to United States issued at Goeppinger, Germany on November 21, 1955

17) In Possession Of Travel Document Or Passport At The Time Of Entry: [ ] Yes [X] No. Describe Document(s). If Subject Did Not Have Travel Document Or Passport At Time Of Entry, Or Does Not Have Such A Document Now, Indicate Whether Ever Obtained One: [ ] Yes [ ] No. State How, When, And Where It Was Obtained: What Kind Of Document It Was, and What Became Of It.: Received immigrant visa to travel to U.S. with parents and siblings.

18) Father's Name: Stanley Zadvydas (AKA: STASYS)
Date Of Birth: May 14, 1913
Place Of Birth: Maseikial, Lithuania
Present Address: Deceased

19) Mother's Maiden Name: Ona Staponace
Date Of Birth: Oct., 30, 1919
Place of Birth: Dovilay, Lithuania-Dawillen, Memel District
Present Address: Great Neck #58 North Van Narand, Long Island, New York

20) Name, Relationship, And Address Of Relatives Abroad: N/A

21) Previously [ ] Excluded [ ] Deported [ ] Required to Depart From The United States
On Claims No. (*Date*) via _____ (*Port*) To _____ (*Country*)

22) Indicate Whether Ever Arrested, In Prison Or A Public Institution In The Country Of Which A National Subject Or Citizen: [ ] Yes [X] No. If So, Give Dates And Places: Left Europe in 1956 at age of eight.

23) Name, Nationality And Present Address Of Spouse, And Date And Place Of Marriage: Maria Zadvydas, 7445 Cook Road, Houston, Texas 77021 – (713) 561-5570

24) Names, Ages And Addresses Of All Children: Lina Zadvydas, Houston, Texas – 13 years

25) If Noncanadian Deportable To Canada, Give Date And Port Of Arrival In Canada And Name Of Vessel: N/A – Not Applicable

Form I-217 (Rev. 3977)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
(TITLE OMITTED IN PRINTING)

Excerpts from the **Transcript of Hearing before District Court Judge Fallon on May 14, 1997, pages 10-13.**

[p.10] Zadvydas – Direct

courts of the power to review agency decisions through the writ of habeas corpus except in the most narrow of circumstances.

We're not even, you know, necessarily asking the Court to review the decision, we're just reviewing his present custody. And I assume even if this Court were to rule against Mr. Zadvydas, which I'm certainly not encouraging the Court to do, that two years from now or six months from now he could come back with another writ saying that I'm being confined.

THE COURT: Okay. Let me hear from the government.

MS. BECNEL: Your Honor, as far as the travel documents, as far as his deportation being affected, we received some information from Mrs. Zadvydas. And in his father's visa application it says that both parents are citizens of Lithuania. That information has been forward to Lithuania and the prior request to Lithuania said that Mr. Zadvydas was stateless, not that the parents were citizens of Lithuania. So INS has a strong belief that he will be accepted into Lithuania. We ask for at least six to eight weeks to let the counsel in Lithuania make a decision on the new information that we provided to him. Lithuania has not sent a denial. They have not responded,

so it's INS' believe that if they had responded by now it would have – if they were going to deny it, then they would have responded by now. And if we receive the information from Houston concerning Mr. Zadvydas' wife and the Dominican Republic will not take him under any conditions, then the INS will consider a release under bond and controlled conditions. That's INS' position.

THE COURT: I understand. The problem that the Court has is that if this person had just been arrested last week, last month, the last six months, the last year, the last two years, the last three years, somewhere along the line, you can say, well, you know, these things take time. All of us know they take time. We're getting to the point where it's just taking too much time for the United States to pick up the phone and talk to somebody. Reach out and touch somebody on this issue. And I'm concerned about it. It ought to concern the Court that someone is sitting in jail and they tell them, "we're going to get around to finding you some place to stay". And I'm sure you're doing your best, but I'm having difficulty understanding why it takes three to four years to make these contacts. Let me hear a response from Mr. Zadvydas.

MR. BARNARD: Your Honor, I hate to beg the indulgence of the Court, but maybe if we remove the cuffs, Mr. Zadvydas is trying to show me documents.

THE COURT: I understand. Marshal, let's do that, please.

(The Marshal complied)

MR. BARNARD: Your Honor, to address the last issue,

[p.12] and I'm just going to touch upon it because I think the Court's heard enough about it. But his whole family came from wherever, Europe for a lack of a better term. Germany, I think was the actual physical location. They all have numbers. They all have funny names, Zadvydas. You know, I mean, the INS shouldn't have had much trouble over the last three or four years in locating the file of the mother, the father, the sisters, the brothers, you know. I just don't understand the INS' position here that they can't find in their own files documents of people who had to go through their system. It's strange, though. It's strange something. And – excuse me. Mr. Zadvydas wanted me to tell – Your Honor, there's two documents, and if I could have an evidence sticker I'll introduce them into evidence.

THE COURT: What are those documents? One of them is a document, which – our next number is 15?

THE CLERK: 14.

MR. BARNARD: It's from the German Government. It's in English. It says, "Dear Miss Hooks, thank you for your letter", and talks about various documents, and it's dated April 6, 1995. So, obviously, again, INS was making inquiries two years ago. And I offer that number 14 into evidence. And Number 15 is dated February of '95, and it talks

[p.13] about a number of different request letters of assistance to INTERPOL, Lithuanian Counsel without success.

Just various attempts, I think, by INS to gather information, I believe, is what it represents.

THE COURT: Okay.

MR. BARNARD: Was there some other issue that you wanted me to address? Oh, I'm sorry. Mr. Zadvydas wanted me to inform the Court that his sister – in one of these documents that I introduced in the magistrate judge's hearing that was held, was a checklist by the sister of how many times she's contacted congressmen and agencies, so it's in the same vein as that document. But she talks to me fairly often and she's told me and Mr. Zadvydas that she has contacted both the Lithuanian Counsel here, or whatever it's called, the Embassy, and the person that was on the earlier letters went back – I'm not exactly sure what implication, if any, that has, but whoever she spoke to, indicated to her on the phone – again this is all hearsay, but Mr. Zadvydas wanted me to convey it to the Court – that they didn't think that Lithuania was going to accept him in any event. And we also have a letter in the record saying that he's not a citizen, they won't accept him.

THE COURT: All right. Okay. I'm going to have to take this one under advisement again; and I will make this a part of the record, those two documents.

[SEAL]

U.S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

New Orleans District Office
701 Loyola Ave. Rm. T-8011
New Orleans, La 70113

June 10, 1997

Petras Anusas
Consul General
Consulate General of Lithuania
420 5th Avenue - 3rd Floor
New York, NY 10018

Dear Mr Anusas:

By letter dated April 23, 1997 (copy enclosed), this office we requested a travel document for Kestuties Zadvydas, A20 823 956.

We have recently located the Service file relating to Mr Zadvydas' father, Stasys Zadvydas. The file contains additional material which may be helpful in your determination. The visa application by Stasys Zadvydas indicates that both he and his wife were natives and citizens of Lithuania. The application indicates that the family was sponsored by United Lithuanian Relief Fund of America, Inc. A copy is enclosed for your consideration. Also enclosed are clearer copies of the documents provided with our letter dated April 23.

It is respectfully requested that you give favorable consideration to our request. It is understood that a decision may take a considerable amount of time as you may want to try to verify the parents' birth through a check of any

records which may have survived the war. It would, therefore, be appreciated if you could provide an interim response indicating that consideration is, in fact, being given to our request.

If you have any questions or need any further information, please let me know.

Your assistance in this matter is appreciated.

Sincerely,

/s/ John B.Z. Caplinger
John B.Z. Caplinger
District Director

Enclosures

OF AMERICA, INC.

DEPARTMENT OF STATE
WASHINGTON, D. C.

Budget Bureau No. 49-R139
Approval Replies [illegible]

ASSURANCE BY AN INDIVIDUAL SPONSOR WITH ENDORSEMENT BY AN ORGANIZATION RECOGNIZED BY THE ADMINISTRATOR

(For use under the Refugee Relief Act of 1953)

DO NOT WRITE IN THIS SPACE

Read Instructions on Page 4 Before Filling in Form

I, ANTANAS KAUHAS *NAME: (First) (Middle) (Last)*, residing at 103 South 4th St., Brooklyn, N.Y. *(Street and No., or R.F.D. No., City, County, State)*, sponsor the admission into the United States under the Refugee Relief Act of 1953 of one principal applicant, spouse, and children, as described below:

SECTION I – THIS SECTION FOR USE IF PRINCIPAL APPLICANT IS NAMED

(Use Section II if principal applicant is not named. Do not fill in both Sections I and II)

---

(1) Principal Applicant STASYS ZADVYDAS *NAME: (First) (Middle) (Last)*, May 14, 1913 Makeikiai, Lithuania Lithuanian (Date of birth) (Place and country of birth) (Nationality), GOEPPINGEN, Flugplatz, Staatl, Wohnheim 5/8, Germany *ADDRESS: ([illegible], or Street and No., City, Province, Country)*

(2) Spouse of principal applicant:

ONA ZADVYDAS

Oct. 30, 1919 Klaipeda Lithuania *(Date of birth) (Place and country of birth) (Nationality)*

CHILD(REN)

(3) IRENA Dec. 11, 1944 Kaulsdorf, Thueringen, Germany *NAME: (Date of birth) (Place and country of birth)*

(4) STASYS Feb. 26, 1946 Wuerzburg, Germany *NAME: (Date of birth) (Place and country of birth)*

(5) ALDONA Mar. 28, 1947 Wuerzburg, Germany *NAME: (Date of birth) (Place and country of birth)*

(6) ALGIRDAS Nov. 21, 1948 Schwab, Gmuend, Germany *NAME: (Date of birth) (Place and country of birth)*

(7) KESTUTIS Nov. 21, 1948 Schwab, Gmuend, Germany *NAME: (Date of birth) (Place and country of birth)*

(8) VYTAUTUS Dec. 30, 1951 Goeppingen, Germany *NAME: (Date of birth) (Place and country of birth)*

I am (not) related to the alien listed under (1) (2), xxxxxxxxx.

SECTION II – THIS SECTION FOR USE IF PRINCIPAL APPLICANT IS UNNAMED

Use Section I for named principal applicant. Do not fill in both Section I and II)

I desire a principal applicant who is a:

[ ] Single man within age ranges of ___ years to ___ years.

[ ] Single woman within age ranges of ___ years to ___ years.

[ ] Man and wife within age ranges of ___ years to ___ years.

VERIFIED UNDER THE REFUGEE RELIEF ACT OF 1953.

No 58009
Date OCT 23, 1955
FROM THE ADMINISTRATOR:

/s/ [Illegible]
[illegible]

United States District Court,
E.D. Louisiana.

Kestutis ZADVYDAS, Plaintiff,

v.

John B.Z. CAPLINGER and Immigration and Naturalization Service, Defendants.

Civil Action No. 96-0810.

Oct. 30, 1997.

ORDER AND REASONS

FALLON, District Judge.

Before this Court is petitioner Kestutis Zadvydas' objection to the report and recommendation of United States Magistrate Judge Louis Moore, Jr., which recommends that the petitioner's application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, be denied. For the reasons that follow, the petitioner's objection is sustained in part, in that the Court finds that the petitioner's detention pending deportation violates his right to substantive due process, and denied in part, in that it is denied in all other respects. The petition for writ of habeas corpus is GRANTED subject to the conditions hereinafter described.

I.

BACKGROUND:

The petitioner was born on November 21, 1948 in a displaced persons' camp in a region of Germany governed by the United States following World War II. His parents were from Lithuania but it is not clear whether

either or both were ever citizens of that country.[1] In 1956, at the age of 8, petitioner was admitted to the United States in connection with a program for the relocation of displaced persons.

On December 8, 1966 petitioner was convicted in the New York Supreme Court, Queens County, of attempted robbery, third degree. On February 7, 1974 he was convicted in New York Supreme Court, Kings County, for attempted burglary, third degree.

The Immigration and Naturalization Service (INS) issued an order to show cause on July 6, 1977 charging petitioner as deportable. On July 13, 1977 petitioner was granted release on his own recognizance and allowed to remain at large pending disposition of his deportation case.

In July 1982 the INS notified petitioner that his hearing before an immigration judge had been rescheduled to August 25, 1982. He failed to appear for his August hearing. He was not heard from for 10 years. INS sent registered letters to his last known address in an attempt to find him. Petitioner apparently moved and claims he never received the letters. During this decade he married, parented a child, was gainfully employed, filed income tax returns, and obtained an extension or reissuance of his immigration card (green card).

On August 17, 1992 petitioner was convicted in Circuit Court of Fairfax County, Virginia for a 1987 offense of possession of a controlled drug (Cocaine) with intent to distribute. Petitioner turned himself in to the police in

[1] His mother denies ever being a Lithuanian citizen.

Houston and was removed to Virginia where he faced the drug charges which led to his conviction. He was sentenced to serve 16 years with 6 years suspended. He served 2 years of his sentence and was released on parole in January 1994. He was immediately taken into custody by the INS and deportation proceedings were begun again. The INS detained the petitioner without bond based upon his aggravated felony conviction. A bond determination hearing was held and the Immigration Judge denied the petitioner's request for a change in status ordering that he remain in custody without bond. The Immigration Judge based this decision on the likelihood that the petitioner would fail to appear for future immigration hearings because of his prior history. The Board of Immigration Appeals (BIA) denied petitioner's appeal.

On March 29, 1994, petitioner's deportation hearing was held. He admitted all allegations and was found deportable. Seeking relief from deportation, the petitioner applied for a waiver under the Immigration and Nationality Act, which was denied on April 26, 1994. The petitioner was ordered deported from the United States to Germany.

In May of 1994, the INS Officer-in-Charge (OIC) in Oakdale, Louisiana began the petitioner's deportation which, as of today, has still not occurred. Although the petitioner immigrated from Germany and represented to the Immigration Judge he was a German citizen, the German government informed the INS that the petitioner is not a German citizen. Rather, he was born in a German holding camp; his parents were once residents of Lithuania. Lithuania has also denied the petitioner's citizenship.

Thus, the petitioner is "stateless" and is being detained indefinitely since the INS is unable to find a country that will claim him.[2]

The petitioner has applied to this Court for habeas corpus relief on grounds that his indefinite detention pending deportation is unconstitutional. The petitioner asserts the following arguments: 1) that he never made a knowing waiver of his constitutional rights, including his right to counsel; 2) that his detention violates international law; 3) that his detention violates due process; 4) that his detention is in effect one for life and thus violates the Eighth Amendment's prohibition against cruel and unusual punishment.

After a thorough review of the record, Magistrate Judge Louis Moore recommended that the petitioner's request for habeas corpus relief be denied. Judge Moore found that the continued detention of the petitioner was statutorily authorized and that the Attorney General did not abuse her discretion in detaining the petitioner. Judge Moore based his finding on the petitioner's prior failure to appear for his initial deportation proceeding and his prior convictions. In addition, Judge Moore found that the petitioner participated knowingly in his proceeding and that his waiver of his right to counsel was voluntary. Lastly, Judge Moore found that neither International Law nor the Eighth Amendment were violated. Because the INS' efforts to deport the petitioner remained ongoing,

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[2] At the time of this writing the petitioner was still being held pending deportation. As of October 1997 the petitioner has been detained for three years and nine months.

Judge Moore reasoned that the petitioner was not being arbitrarily imprisoned for an indefinite amount of time.

The petitioner now moves this Court to reconsider Judge Moore's report and recommendation under 28 U.S.C. § 636(b)(1)(C). Petitioner asserts that Judge Moore erred in finding that petitioner's original hearing comported with due process and in finding that petitioner's detention was constitutional. The INS urges its original arguments but also asserts that, because of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Judge Moore as well as this Court has no jurisdiction to review any claims stemming from the petitioner's deportation order.

II.
JURISDICTION OF THE COURT

Before considering the merits of this cause, it is incumbent on the Court to first address the jurisdictional issue.

The Illegal Immigration and Reform and Immigrant and Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009, signed into law by President Clinton on September 30, 1996, entirely redefined the scope and/or availability of judicial review of immigration orders and decisions. Section 306 of the IIRIRA rewrote 8 U.S.C. § 1252 (§ 242 of the Immigration and Nationality Act) and provides limits on judicial review of immigration matters. Section 242(g) of the Immigration and Nationality Act ("INA"), as amended by IIRIRA, provides as follows:

> (g) EXCLUSIVE JURISDICTION. Except as provided in this section and notwithstanding any

> other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the Immigration and Nationality Act ("INA")].

See IIRIRA § 306. Most of the amendments to the INA made pursuant to the IIRIRA do not effect habeas corpus petitions filed prior to the effective date of April 1, 1997. Section 1252(g), however applies retroactively, "without limitation to claims arising from all past, pending or future exclusion, deportation or removal proceedings." *Dorean Vayspitter v. United States General Attorney*, 1997 WL 299372, *3 (E.D.La. June 3, 1997); IIRIRA section 306, as amended October 11, 1996 Pub.L. No. 104-302, 110 Stat. 3656, 3657.

Because of Section 1252(g), the Government contends that under the clear terms of § 242(g) of the INA, as amended by the IIRIRA, this Court lacks jurisdiction to entertain the petitioner's claims. In support of their contention, the government cites two recent decisions, *Yang v. I.N.S.*, 109 F.3d 1185 (7th Cir. 1997) and *Safarian v. Reno*, 968 F.Supp. 1101 (E.D.La. 1997). In *Yang*, the Seventh Circuit held that under § 242(g) the district courts are precluded from exercising jurisdiction over deportation-related matters pursuant to 28 U.S.C. § 2241 or any other provision of law. In so holding, the *Yang* court emphasized that, "Congress wanted to expedite the removal of criminal aliens from the United States by eliminating judicial review, not to delay removal by requiring aliens to start the review process in the district court rather than the court of

appeals." *Yang*, 109 F.3d at 1195. Next, the government cites *Safarian, supra*, in which the United States District Court for the Eastern District of Louisiana held that, "the express provisions of the IIRIRA clearly remove jurisdiction under any statute, including a right to habeas corpus under § 2241." According to the Government, only by divesting the federal courts of the power to review agency decisions through the writ of habeas corpus will the "streamlined appeal and removal process" intended by Congress be achieved. H.Rep. No. 104-469(I), 104th Cong., 2d Sess. 359, 463 (1996) (reproduced at 1996 WL 168955).

In his supplemental memorandum on jurisdiction the petitioner argues that this Court has the power to review through the writ of habeas corpus. Despite the enactment of the IIRIRA, the petitioner maintains that this Court retains habeas corpus jurisdiction under 28 U.S.C. § 2241 or Art. I, § 9, cl. 2 of the Constitution. The petitioner contends that this Court has habeas jurisdiction under 28 U.S.C. § 2241 because § 242(g) of the INA, as amended by the IIRIRA, does not effectively eliminate this habeas review. In the alternative, the petitioner contends that even if the IIRIRA validly eliminates the federal courts' habeas review under 28 U.S.C. § 2241, review is nevertheless available under the constitutional writ, unaided by statute.

A. History of Habeas Corpus

It is appropriate at this point to review the historical development of habeas corpus. The history of the right of personal liberty began before the writ of habeas corpus

originated. The right was granted, at least to some English subjects, by Article 39 of Magna Carta, which provided that no free man should be arrested, imprisoned, or destroyed except by the judgment of his peers or by the law of the land. Magna Carta, Art. 39. The essence of this article has been traced back through English law books of the Twelfth Century to documents of the Holy Roman Empire of the Eleventh Century. Richard L. Perry and John C. Cooper, Sources of Our Liberties, p. 5 (1978). Although there has been scholarly dispute on the subject, as early as the Fourteenth Century the "law of the land" provision was considered to be the equivalent of "due process of law". Richard L. Perry and John C. Cooper, Sources of Our Liberties, p. 189 (1978); William S. Hollsworth, A History of English Law, 4th ed., Vol. 1, pp. 60-63 (1931). In addition, the protection of this provision was extended to all citizens and not just to the "freemen" who were a limited group of land barons. William S. Holdsworth, A History of English Law, Vol. 1, p. 227 (4th ed. 1931); *Ex Parte Yerger*, 75 U.S.(8 Wall.) 85, 96, 19 L.Ed. 332 (1868).

In America the Colonist claimed the writ as one of the "rights of Englishmen" to which they were entitled under their charters and by reason of the common law. As a result, the privilege of the writ of habeas corpus was incorporated into the constitutions adopted by the states at the time of the American Revolution. See, e.g., Constitution of Pennsylvania, Art. IX (1776). Constitution of Maryland, Art. XXI (1776).

B. Habeas Corpus Protected by Constitution

Habeas corpus is referenced in the Constitution of the United States. Because the writ of habeas corpus plays such a central role in protecting individual liberty, the framers provided in Art. 1, § 9, cl. 2 of the Constitution that "the privilege of the Writ of Habeas Corpus shall not be suspended [except during times of rebellion]."

C. Habeas Jurisdiction Under Statute

In addition to the specific reference in the Constitution, the writ has also been granted by statute. The federal courts have had the power to grant writs of habeas corpus since enactment of the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82 (the "1789 Act"). In 1867, Congress expanded the Supreme Court's statutory appellate jurisdiction while also expanding the power of the federal courts to issue writs of habeas corpus, permitting the issuance of such writs "in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States." *Yesil v. Reno*, 958 F.Supp. 828, 1997 WL 86391 (S.D.N.Y. Feb. 27, 1997) (citing Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (the "1867 Act.")) The current version of the Habeas Act is found in 28 U.S.C.A. §§ 2241-2255.

Section 2241 of Title 28 of the United States Code establishes federal courts' power to grant the writ of habeas corpus. It provides, in part, that:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district court and any circuit judge within their respective jurisdictions

. . . .

(c) The Writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under the color or by color of the authority of the United States or

. . . .

(3) He is in custody in violation of the Constitution or laws or treaties of the United States

. . . .

28 U.S.C. § 2241(a), (c)(1), (c)(3). Section 2241 is the direct descendant of Section 14 of the Judiciary Act of 1789 and the 1867 Act, which expanded the scope of the writ. See Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82; Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. Under Section 2241 habeas corpus will lie to protect the fundamental liberties guaranteed under the Constitution. *Benziane v. U.S.*, 960 F.Supp. 238 (D.Colo. 1997).

The petitioner argues that his access to this judicial review should not be restricted because there is not sufficient "clear and convincing evidence" that the IIRIRA repeals the district court's habeas corpus review under 28 U.S.C. § 2241. His argument is based on the principle espoused by the Supreme Court in *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41, 87 S.Ct. 1507, 1510-11, 18 L.Ed.2d 681 (1967). In *Abbott Labs*, the Supreme Court adopted a presumption of reviewability which it derived from the structure of the Administrative Procedure Act: "[T]he Administrative Procedure Act . . . embodies the basic

presumption of judicial review. . . . [O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should courts restrict access to judicial review."

Almost one-hundred thirty years ago, and again last year, the Supreme Court explicitly admonished that Congressional intent to repeal habeas jurisdiction must be express and that "[r]epeals by implication are not favored." *Felker v. Turpin*, 518 U.S. 651, ___, 116 S.Ct. 2333, 2338, 135 L.Ed.2d 827 (1996); *see also Ex Parte Yerger*, 75 U.S.(8 Wall.) 85, 105, 19 L.Ed. 332 (1868). In both *Felker* and *Yerger* the Court refused to read jurisdiction modifying statutes enacted by Congress as repealing other avenues of habeas jurisdiction that had not been specifically abrogated, much less mentioned, by those jurisdiction modifying statutes. "Only upon a clear statement can a court conclude that Congress meant to repeal an independent avenue of habeas jurisdiction." *Mojica v. Reno*, 970 F.Supp. 130 (E.D.N.Y. 1997). Such a clear statement is absent from the governing statute in the present case.

The Government points to the phrase "notwithstanding any other provision of law, no court shall have jurisdiction . . . " In § 242(g) of the INA, as amended by IIRIRA, as evidence that Congress intended to eliminate the district courts' recognized jurisdiction under 28 U.S.C. § 2241. They assert that this is "clear and convincing evidence" that Congress repealed the district courts' power to hear habeas corpus claims of any person in custody, including deportable aliens.

On this point the Court finds helpful the reasoning of the District Court for the District of Columbia in *Ozoanya v.*

Reno, 968 F.Supp. 1 (D.D.C. 1997), a case addressing the issue of whether 28 U.S.C. § 2241 remains a viable basis for habeas jurisdiction after the enactment of the IIRIRA. In *Ozoanya*, the United States District Court for the District of Columbia held that the district courts' jurisdiction to hear claims brought by deportable aliens under 28 U.S.C. § 2241 survives the 1996 amendments to the INA. In so holding the court stated:

> It follows from *Felker* that if Congress had intended to eliminate the district courts' jurisdiction under 28 U.S.C. § 2241 to consider habeas corpus petitions filed by a certain class of persons in custody, it would have had to do so affirmatively and clearly. There is nothing in the language of . . . the IIRIRA to suggest that Congress expressly repealed Section 2241, limited its scope or eliminated the jurisdiction of the district courts under that statute to consider petitions for writs of habeas corpus. . . .
>
> The language of . . . the IIRIRA is "at best ambiguous" it "[does] not state that they repeal or amend section 2241; indeed they do not mention section 2241 at all." *Yesil v. Reno*, 958 F.Supp. 828, 838 (S.D.N.Y. 1997).

Ozoanya, 968 F.Supp. at 6-7.

In *Mojica v. Reno, supra*, the United States District Court for the Eastern District of New York also found that the general habeas statute at 28 U.S.C. § 2241 continues to provide a jurisdictional basis for relief from deportation orders. *Mojica*, 970 F.Supp. 130 (E.D.N.Y. 1997). In an opinion that supplements *Ozoanya*, the *Mojica* court stated:

> Congress is expert in the process of lawmaking. Had it desired to repeal section 2241, or render it inapplicable to challenges to deportation orders, it would have taken the necessary steps to do so. It must be presumed that Congress was mindful of the necessity for a clear statement to that effect. Congress is presumed to know the law. As the *Felker* Court acknowledged, Congress knows how to repeal habeas jurisdiction. Where it intended to do so, it states that intention expressly. *See, Felker v. Turpin*, 518 U.S. 651, ___, 116 S.Ct. 2333, 2338, 135 L.Ed.2d 827 (1996).

Mojica, 970 F.Supp. at 160 (citations omitted).

The *Mojica* court also referred to findings relating to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (1996), the statutory predecessor to the IIRIRA. The AEDPA, like IIRIRA, also contained a section which attempted to withdraw habeas corpus jurisdiction by all courts. Like the IIRIRA, the AEDPA did not expressly purport to modify section 2241. *Yesil*, 958 F.Supp. 828 (S.D.N.Y.). The *Mojica* Court, to provide further support for their holding, pointed out that district courts addressing the AEDPA's effect on § 2241 "have been almost unanimous in their agreement that § 2241 is available and has not been repealed." *Mojica*, 970 F.Supp. At 161, [citing *Yesil*, 958 F.Supp. 828 (S.D.N.Y. 1997); *Eltayeb v. Ingham*, 950 F.Supp. 95 (S.D.N.Y. 1997); *Duldulao v. Reno*, 958 F.Supp. 476 (D.Haw. 1997); *Dunkley v. Perryman*, 1996 WL 464191 (N.D.Ill. 1996); *Mbiya v. INS*, 930 F.Supp. 609 (N.D.Ga. 1996)]. Essentially, all these courts found that § 2241 was still available despite the enactment of the AEDPA, because the latter did not expressly repeal § 2241.

Because the AEDPA and the IIRIRA basically contained the same jurisdictional withdrawal provision, the Court in *Mojica* utilized this logic in analyzing the effect of IIRIRA on § 2241 jurisdiction. By doing so it came to the conclusion stated earlier that, in the wake of the IIRIRA, section 2241 remains a viable basis for habeas jurisdiction. *Mojica*, 970 F.Supp. at 159-163.

This Court agrees with the reasoning of both the *Ozoanya* and *Mojica* courts. Because the IIRIRA does not amend, or even mention, section 2241 of Title 28, the Court cannot conclude that Congress repealed § 2241 by implication. In order to have effectively repealed this statute Congress would have had to say so explicitly. It must be remembered that "[c]ourts do not have to resort to divining phantom or unarticulated Congressional intentions to repeal habeas jurisdiction from the void of statutory silence." *Mojica*, 970 F.Supp. at 160. Furthermore, if the Court were to find that the statute was repealed, the Court arguably would be violating the Suspension Clause of the Constitution. See Art. I, § 9, cl. 2; *Mbiya*, 930 F.Supp. at 612 ("Any attempt by Congress to restrict this sphere of authority necessarily would create constitutional difficulties not only with respect to the Suspension Clause, but also with respect to the Constitution's delineation of authority between the branches of the government").

D. Continued Viability of Habeas Corpus

In summary, from a historical and jurisprudential perspective, it is clear that the great writ still has vitality and that this court has jurisdiction. The suggestion that the

IIRIRA bars all habeas corpus review must be rejected. *See Yang v. INS*, 109 F.3d 1185, 1194-97 (7th Cir. 1997); *Boston-Bollers v. INS*, 106 F.3d 352, 355 (11th Cir. 1997); *Williams v. Immigration & Naturalization Service*, 114 F.3d 82, 84 (5th Cir. 1997). In the present case, however, it is necessary to explore whether this petitioner, a non citizen legal alien, fits within the scope of this concept.

III.

Scope of Habeas Review

"Habeas Corpus review under § 2241 [or as contemplated by art. 1, section 9 of the Constitution] is justified if an alien subject to an order of deportation based on violation of crimes enumerated by Congress demonstrates some grave constitutional error or a fundamental miscarriage of justice." *Mbiya*, 930 F.Supp. 609, 612 (N.D.Ga. 1996); *See also, Yesil*, 958 F.Supp. 828 (S.D.N.Y. 1997); *Eltayeb*, 950 F.Supp. 95 (S.D.N.Y. 1997). With the enactment of the IIRIRA, Congress evidenced its desire to expedite the deportation of criminal aliens and to restrict all judicial review of final orders of deportation to the greatest extent possible. Thus, in determining the scope of habeas review, courts have concluded that review should be limited to those situations in which deportation would result in a fundamental miscarriage of justice. *Id.* The rationale for this narrow scope of review is that it "is necessary to accommodate the balance between an alien's constitutional right to habeas review and Congress' power over matters of immigration." *Eltayeb*, 950 F.Supp. at 99. Hence a court should grant relief to the petitioner only if he demonstrates some grave constitutional error

or a fundamental miscarriage of justice. Accordingly, the Court will analyze the petitioner's claims under this narrow standard of review.

A. Procedural Due Process Claims – Deportation Hearing

The Court will first address the petitioner's claim that his deportation hearing was in violation of his right to due process. Specifically, the petitioner claims that the deportation hearing violated procedural due process and fundamental fairness because the petitioner never made a knowing waiver of his constitutional rights. The petitioner contends that because he was never told by the Immigration Judge that he could be detained for an indefinite period of time as a result of the deportation hearing, he waived several important rights and made a number of significant admissions, such as electing not to obtain an attorney and admitting he was a German citizen. He also contends that he was never told by the Immigration Judge that his relatives' interest would be one of the principal determining factors in the outcome of the case. Furthermore, he was never asked by the Immigration Judge if he could obtain affidavits from his relatives expressing their interest. Accordingly, the petitioner contends that his right to call such witnesses and produce affidavits was waived unknowingly.

Aliens within this country who face expulsion are entitled to the procedural safeguards of due process. As the Supreme Court has held, "once an alien gains admission to a country and begins to develop the ties that go with permanent residence his constitutional status changes

accordingly." *Landon v. Plasencia*, 459 U.S. 21, 32-33, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982). "The Supreme Court has frequently suggested that a continuously present alien is entitled to a fair hearing when threatened with deportation, and, has developed the rule that a continuously present permanent resident alien has a right to due process in such a situation." *Id.*

The Due Process Clause of the Fifth Amendment provides that "[n]o person . . . shall be deprived of life, liberty, or property without due process of law. . . . " It protects individuals against two types of government action. "Substantive Due Process" prevents the government from engaging in conduct that "shocks the conscience,"[3] or interferes with rights "Implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325-26, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). "Procedural Due Process" ensures that government action depriving a person of life, liberty, or property is implemented in a fair manner. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

As stated above, "the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306, 113 S.Ct. 1439, 1449, 123 L.Ed.2d 1 (1993). Accordingly, the Immigration Judge must conduct deportation hearings in accord with the standards of due process. *Olabanji v. I.N.S.*, 973 F.2d 1232, 1234 (5th Cir. 1992). If the deportation hearings are not conducted properly, a due process violation exists when the defect impinges "upon the fundamental fairness of the hearing

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[3] *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952).

in violation of the Fifth Amendment, and there existed substantial prejudice." *Ogbemudia v. I.N.S.*, 988 F.2d 595, 598 (5th Cir. 1993).

1. Petitioner's waiver of right to counsel

Although Congress has provided by statute that an alien has a right to obtain counsel at his own expense, an alien does not have a Sixth Amendment right to counsel in an immigration proceeding. Thus, "any right an alien may have in this regard is grounded in the fifth amendment guarantee of due process rather than the sixth amendment right to counsel." *Barthold v. U.S. Immigration and Naturalization Service*, 517 F.2d 689 (5th Cir. 1975).

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), established the "totality of circumstances approach" for reviewing waiver of Fifth Amendment rights. In order for a waiver of right to counsel to be valid it must be made knowingly and intelligently. *Molignaro v. Smith*, 408 F.2d 795 (5th Cir. 1969). Thus if petitioner's waiver of counsel was not made knowingly or intelligently, then the Immigration Judge's acceptance of it could constitute a due process violation if it impinged "upon the fundamental fairness of the hearing in violation of the Fifth Amendment" and resulted in substantial prejudice. *Ogbemudia*, 988 F.2d at 599. The determination of whether a waiver of the right to counsel has been made knowingly and intelligently depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

The petitioner likens his waiver of rights in the administrative hearing to those waived by a criminal defendant in a guilty plea. The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 369, 88 L.Ed.2d 203 (1985). The petitioner contends that he did not knowingly waive his right to counsel at the deportation hearing because the Immigration Judge did not inform him that a result of the hearing could be prolonged detention. After review and study of the administrative record, the United States Magistrate Judge found that the petitioner, despite the claimed defect, knowingly and intelligently waived his right to counsel. This Court agrees.

Having reviewed the record in light of the "totality of the circumstances," the Court is convinced that the petitioner's waiver of counsel during the deportation hearing was constitutionally valid and that there was no fundamental unfairness in the Immigration Judge's acceptance of this waiver. Therefore, the petitioner was not deprived of due process. First, the petitioner should have known about the value of counsel in legal proceedings due to his extensive first hand knowledge of the criminal justice system. Secondly, he was specifically told that he had a right to counsel and was advised about the ramifications and possible consequences of his admissions. This factor alone is sufficient to support a finding that there was not a denial of due process. *Barthold*, 517 F.2d 689 (5th Cir. 1975).

The Court does not agree with the petitioner that the Immigration Judge had a duty to inform him, that if

found deportable he could be detained while awaiting deportation. The nature of a deportation hearing is civil in nature. *Ramirez-Osorio v. I.N.S.*, 745 F.2d 937 (5th Cir. 1984). "Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984). Thus, a waiver of counsel in a deportation hearing need not be "made with an apprehension of . . . the range of allowable punishments thereunder, . . . and all other facts essential to a broad understanding of the matter." *Von Moltke v. Gillies*, 332 U.S. 708, 724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (1948). In short, the petitioner has failed to present any authority for his argument that an Immigration Judge in a deportation proceeding must inform the alien of all the possible consequences that might result from a finding of deportability. Accordingly, the Court finds the fact the Immigration Judge failed to inform the petitioner of the possibility of prolonged detention did not alter the fact that the waiver of counsel was made knowingly. Hence, the deportation hearing was conducted in accordance with the requirements of due process and fundamental fairness.

2. Petitioner's lack of affidavits and admissions that he was a Citizen of Germany

The second prong of the petitioner's due process claim, is that his lack of attorney prejudiced him at the deportation hearing. As such the petitioner believes that the deportation hearing was unfair and did not comport with the requisites of procedural due process. Specifically, the petitioner contends that the lack of affidavits

from his relatives and his conclusion that he was a German citizen interfered with his chance to obtain Section 212(c) relief of the Immigration Act. Accordingly, the petitioner contends that his right to due process of the law was violated.

Under Section 212(c) of the Immigration and Nationality Act, aliens admitted for permanent residence who have maintained a lawful unrelinquished domicile in the United States for seven consecutive years, may in the Attorney General's discretion, be permitted to continue residing in the United States notwithstanding their deportability under other sections of the Act. *Ashby v. I.N.S.*, 961 F.2d 555 (5th Cir. 1992). Section 212(c) does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. *Id.* Rather, the petitioner bears the burden of demonstrating that his request for a waiver warranted favorable consideration. Further, "because section 212(c) does not provide standards governing how the Board's discretion should be exercised, the Attorney General has unusually broad discretion in granting and denying waivers." *Id.*

In order to provide the framework for an equitable application of discretionary relief, the Board has enunciated factors relevant to the issue of whether § 212(c) relief should be granted as a matter of discretion:

> Among the factors deemed adverse to a respondent's application have been the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's laws, the existence of a criminal record and, if so, its

> nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as permanent resident of this country.

Matter of Marin, 16 I & N Dec. 581, 584-85 (BIA 1978). The decision to grant § 212(c) relief is within the sole discretion of the Immigration Judge.

The AEDPA and the IIRIRA both evidence Congress' intent to preclude from review those matters particular to the agency's discretion and expertise – i.e., matters involved in determinations of deportability. *Anwar v. I.N.S.*, 107 F.3d 339, 342 (5th Cir. 1997). The petitioner, however, does not ask this Court to review the decision of the Immigration Judge to deny discretionary relief. Rather, the petitioner is seeking review of certain procedural aspects of the hearing at which the Immigration Judge decided not to grant discretionary relief under § 212(c). Accordingly, the petitioner's challenges are reviewable by this Court for the purpose of determining whether the hearing was conducted in accordance with due process.

a. Lack of Affidavits

The petitioner's alleged due process violation is that he was never told that he, pursuant to § 212(c), could provide affidavits at the hearing in support of his application for § 212(c) relief. Accordingly, the petitioner contends that this defect rendered the hearing unfair and that he was substantially prejudiced thereby. The Board of Immigration Appeals has set forth several "favorable

considerations" on which the alien may "present [ ] evidence in support of a favorable exercise of discretion" under § 212(c):

> Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country . . . , evidence of hardship to the respondent and family if deportation occurs, . . . , a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives).

Matter of Marin, 16 I & N Dec. at 584-85 (citation omitted). The petitioner argues that his right to due process of the law was violated by the Immigration Judge failing to inform him that he could provide affidavits and then basing the decision to deny § 212(c) relief on a lack of such affidavits.

The Court finds that the petitioner's lack of affidavits did not "impinge upon the fundamental fairness of the hearing in violation of the Fifth Amendment," or substantially prejudice the petitioner. *Ogbemudia*, 988 F.2d at 595 (5th Cir. 1993). First, a due process challenge requires a showing of substantial prejudice to the petitioning alien. *Hernandez-Garza v. INS*, 882 F.2d 945 (5th Cir. 1989). Also, "to render a hearing unfair, the defect or practice complained of must have been such as might have led to a denial of justice, or there must have been absent an element deemed essential to due process." *Animashaun v.*

Immigration and Naturalization Service, 990 F.2d 234, 238 (5th Cir. 1993).

The petitioner, however, contends that his due process rights were violated because the Immigration Judge made the lack of affidavits a key factor in deciding whether to grant § 212(c) relief. Essentially the petitioner contends that had he been informed of his right to provide affidavits from his relatives indicating they would suffer emotional hardship if he were deported, he would have done so. According to the petitioner, these affidavits would have persuaded the Immigration Judge to grant relief under § 212(c). Thus, the petitioner contends that he was substantially prejudiced by his lack of affidavits. The Court disagrees.

The Immigration Judge, despite the lack of affidavits outlining hardship, assumed that deportation would adversely effect the petitioner and his relatives. He then "balance[d] the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether granting section 212(c) relief appear[ed] in the best interests of this country." *Matter of Marin*, 16 I & N Dec. at 584-85. Balancing these factors, the Immigration Judge found that the extreme hardship the petitioner and his family would suffer if he was deported was one of the most positive equities weighing in his favor. The effect that the petitioner alleges the affidavits would have had on the deportation hearing was achieved when the Immigration Judge assumed that the deportation would cause extreme hardship. Thus, the lack of affidavits did not prejudice the petitioner.

Moreover, the court finds no fundamental unfairness in the deportation hearing because the petitioner cannot point to anything in § 212(c) that required the Immigration Judge to inform him of his right to submit affidavits from relatives. Had the petitioner retained counsel, it would have been the obligation of the attorney to inform him of this right. However, the Immigration Judge was not the petitioner's counsel. Thus, the Immigration Judge's failure to inform the petitioner of his right to submit affidavits from relatives did not lead to a denial of justice. Hence, the petitioner's original deportation hearing was fair and comported with the requisites of due process.

b. Petitioner's Admission that he was a German Citizen

The petitioner also contends that the immigration judge mistakenly believed he was a German citizen. According to petitioner, had the Immigration Judge realized he had no country that would claim him as a citizen, the Immigration Judge would have granted him relief under § 212(c). Thus, he contends that the deportation hearing was constitutionally flawed. The Court disagrees.

The Immigration Judge did not deny § 212(c) relief simply because he believed that the petitioner was a German citizen. Section 212(c) relief was denied because of the petitioner's past criminal history and his prior episode of "bond jumping." The fact that the petitioner claimed he was a German citizen played only an insignificant part, if any, in the Immigration Judge's decision to deny § 212(c) relief. On page 14 of his Motion and

Incorporated Memorandum to Review the Magistrate's Report and Recommendation, the petitioner even admits that the conclusion was innocuous. Accordingly, this Court finds that the Immigration Judge's finding as to the petitioner's citizenship did not substantially prejudice the petitioner, or render his hearing fundamentally unfair.

B. Substantive Due Process Claim – Detention pending Deportation

The petitioner claims that his continued detention pending deportation violates his Fifth Amendment right to substantive due process. In arguing that the length of his detention (a denial of petitioner's asserted liberty interest) "shocks the conscience," the petitioner focuses on the substantive nature of the alleged constitutional violation.

Narrowly framed, the issue before this Court is whether a legal alien who is under a final order of deportation may be permanently incarcerated because the INS cannot find a country to take him. The Court must determine whether such detention is beyond permissible constitutional limitations. *Tran v. Caplinger*, 847 F.Supp. 469 (W.D.La. 1993).

1. Statutory Authority

It is necessary to note that control over matters of immigration and naturalization is the "inherent and inalienable right of every sovereign and independent nation." *Fong Yue Ting v. U.S.*, 149 U.S. 698, 711, 13 S.Ct. 1016, 1021, 37 L.Ed. 905 (1893). Under the United States

Constitution, such control is vested in the political branches of government. See U.S. Const., art. 1, § 8, cl.4. Congressional power in their area is plenary, subject to only limited judicial review. See *Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977). In exercising its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews*, 426 U.S. at 80, 96 S.Ct. at 1891. Nonetheless, aliens both legal and illegal, are entitled to the constitutional protection of due process, equal protection and reasonable bail. *Id.* Also, legal aliens subject to deportation – the category in which petitioner falls – generally are granted greater substantive rights than are excludable aliens. *Landon*, 459 U.S. at 26-27, 103 S.Ct. at 325-26. With this in mind, the Court will review the petitioner's detention to determine whether it is violative of his substantive due process rights.

At the outset, the Court notes that petitioner is properly classified as a convicted aggravated felon because of his controlled substance violation. True, the petitioner has served his sentence and hence paid his debt to society, but that fact does not alter this status. See, 8 U.S.C. § 1101(a)(43). Petitioner does not challenge this finding.

The INA authorizes the Attorney General on behalf of the INS to take an alien into custody pending deportation. See generally, 8 U.S.C. § 1252. Section 1252(a)(2)(A) of the Act specifically provides for the detention of aggravated convicted felons, as follows:

> The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised

> release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) but subject to subparagraph (B), the Attorney General shall not release such felon from custody.

Paragraph (B) then provides:

> The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

Section 1252(a)(2) creates a rebuttable presumption against the release of any alien who is convicted of an aggravated felony. *See Matter of Ellis*, 1993 WL 65657 (BIA 1993). Detention is required by 8 U.S.C. § 1252(a)(2)(A) unless the alien can rebut the presumption by successfully meeting the burden of proof set forth in 8 U.S.C. § 1252(a)(2)(B). Deportable aliens, convicted of aggravated felonies, who are lawfully admitted have an opportunity to overcome the presumption against their release by presenting favorable evidence to an Immigration Judge in an individual bond hearing. In order to be eligible for release, an alien convicted of an aggravated felony must show that he is lawfully admitted, that he is not a threat to the community, and that he is likely to appear at any scheduled hearings. 8 U.S.C. § 1252(a)(2)(B).

In this case, petitioner has established that he was lawfully admitted to this country; as to the other two

requirements, however, petitioner has not met his burden of proof. Considering petitioner's recidivist history and his prior episode of "bond jumping," petitioner has not met his burden of proving that he is not a threat to the community and that he is likely to appear for scheduled hearings.[4]

According to the language of 8 U.S.C. § 1252(a)(2)(A) detention is clearly mandated for aggravated felons who have not overcome the presumption against their release. See 8 U.S.C. § 1252. The language of 8 U.S.C. § 1252(a)(2)(B) and the Transitional Custody rules of the IIRIRA also contain language which supports mandatory detention. Additionally, nowhere in the relevant statute does Congress place a time limit on the detention. In *Tran v. Caplinger*, 847 F.Supp. 469 (W.D.La. 1993), the District Court for the Western District of Louisiana stated:

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[4] The petitioner has received a discretionary bond redetermination based entirely on the recent enactment and invocation of the superseding Transitional Custody Rules of the IIRIRA. The Transition Period Custody Rules replaced the amendments made by section 440(c) of the AEDPA. Aliens who, like the petitioner, are deportable for having been convicted of an aggravated felony or a controlled substance violation may be released if: "(I) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding."

See Section 303(b)(3)(B) of the IIRIRA. Consequently, in compliance with the Transitional Custody Rules, INS has interviewed the petitioner and has reviewed his file. Again, the INS has decided not to release the petitioner because he has not met his burden of proving that he is not a threat to the community and that he is likely to appear for scheduled hearings.

> Congress has made provisions for expediting deportation proceedings of aliens who are convicted of committing aggravated felonies. See 8 U.S.C. § 1252(a). However despite efforts to expeditiously deport aggravated felons, there are times when circumstances beyond the control of the Attorney General and her agents make immediate deportation impracticable, unadvisable, or impossible. When such delays occur, Congress has not expressly limited the power of the Attorney General to detain such aliens. Neither section 1252(a)(2) nor section 1252(a) places a time limit upon the period of detention. Clearly, Congress knows how to place time limits upon the period of detention if they had chosen to do so. See 8 U.S.C. § 1252(c).

Consequently, the mandatory language and the absence of a time limit on detention leads this Court to conclude that "indefinite detention of deportable aliens who are aggravated felons is statutorily authorized when immediate deportation is not possible and the alien has not overcome the presumption against his release." Tran, 847 F.Supp. at 474. *See, also, Palma v. Verdeyen*, 676 F.2d 100 (4th Cir. 1982); *Gisbert v. U.S. Atty. Gen.*, 988 F.2d 1437 (5th Cir. 1993).

2. Constitutional Challenge

This Court agrees with the Court in *Tran*, that "[w]hile there is statutory authority allowing indefinite detention of an alien who is classified as an aggravated felon under immigration law where the alien is unable to overcome the presumption which is established by 8 U.S.C. § 1252(a)(2), it is unclear how long this detention

can continue without becoming violative of an alien's constitutional rights." Thus, "it is necessary for this Court to analyze the Petitioner's detention in light of his constitutional challenge to determine whether Petitioner's detention has continued beyond permissible constitutional limitations." *Id.*

At the outset this Court again notes that the Fifth Amendment's mandate that "no person shall . . . be deprived of life, liberty, or property, without due process of law" extends due process protection to persons within the territorial United States and not just to U.S. citizens. *See Plyler v. Doe*, 457 U.S. 202, 210-12, 102 S.Ct. 2382, 2391-92, 72 L.Ed.2d 786 (1982); *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140 (1896). Thus, the petitioner is entitled to have his detention reviewed by this Court to make sure it comports with the notions of due process.

The constitutionality of the detention must be considered in light of its purpose. The Fifth Circuit has indicated that the focus must be on "whether the detention is imposed for the purpose of punishment or whether it is merely incidental to another legitimate governmental purpose." *Gisbert v. United States Attorney General*, 988 F.2d 1437, 1441 (5th Cir. 1993), citing *Schall v. Martin*, 467 U.S. 253, 268-69, 104 S.Ct. 2403, 2412, 81 L.Ed.2d 207 (1984). Absent "any expression of intent to punish on the part of the government, that determination will generally turn on 'whether an alternative purpose to which [the detention] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].' " *Id.* at 1441-42, citing *Schall*, 467 U.S. at 268-69, 104 S.Ct. at 2411-12.

The legislative history and text of Section 1252 clearly shows that Congress did not contemplate permanent detention as a means of punishment for aliens convicted of aggravated felonies who have already served their sentence. *Tran*, 847 F.Supp. at 474. Section 1252(a)(2)(B) of the INA and § 303(b)(3)(B) of the IIRIRA provides for the release of a lawfully admitted alien who has been convicted of an aggravated felony where the alien has demonstrated that he is neither a threat to others nor a flight risk. Thus, the purpose behind detention of these aliens is to protect the community from aggravated felons and to prevent aliens from absconding before deportation can be accomplished. *Id.*, *Caballero v. Caplinger*, 914 F.Supp. 1374 (E.D.La. 1996). Accordingly, the question of whether petitioner's detention complies with substantive due process ultimately turns on whether the detention in petitioner's case is excessive in relation to these goals.

The court in *Tran* determined that continued detention of a non-excludable alien under § 1252 pending deportation is not an excessive means of accomplishing the government's purpose. *Tran*, 847 F.Supp. 469. The *Tran* court recognized the heightened interest of Congress in immigration matters and noted that the INS had limited application of § 1252(a)(2) detention to those aliens who have already been judicially determined to have committed a felony. *Id.* at 475. The Court also notes that in *Gisbert* the Fifth Circuit using essentially the same rationale as the court in *Tran* found that the continued detention of an excludable alien pending deportation was not an excessive means of accomplishing the purposes sought to be served by § 1252(a). *See also Caballero*, 914 F.Supp. at 1374.

It is clear that protecting the community from aggravated felons and preventing aliens from absconding before deportation are legitimate governmental policy goals that, "can warrant a deprivation of liberty under the proper circumstances." *U.S. v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

The particularly troublesome aspect of the petitioner's detention is its duration to date and its potential, if not certainty, for indefinite duration in the future. Detention is intended for the sole purpose of effecting deportation, and once it becomes evident that deportation is not realizable in the future, the continued detention of the alien loses its *raison d'etre*. If there is nowhere to send the alien, then indefinite detention is no longer a temporary measure in the process of deportation; it is permanent confinement. "Detention pending deportation seems properly analogized to incarceration pending trial or other disposition of a criminal charge, and is, thus justifiable only as a temporary measure." *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

Federal circuit and district courts have long held that deportable aliens in custody for more than a few months must be released because such detention becomes imprisonment. For example, in *Petition of Brooks*, 5 F.2d 238, 239 (D.Mass. 1925) the court declared:

> "The right to arrest and to hold or imprison an alien is nothing but a necessary incident of the right to exclude or deport. There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as punishment for a crime. Slavery was abolished by the Thirteenth

> Amendment. It is elementary that deportation or exclusion proceedings are not punishment for a crime. . . . He is entitled to be deported or to have his freedom."

and, in *United States ex rel. Ross v. Wallis*, 279 F. 401, 403-04 (2d Cir. 1922), the court stated:

> " . . . we therefore express an opinion that unless this relator, or any other person similarly situated, be actually deported within four months after such alien has exhausted his legal remedies, any further or other detention under pretense of awaiting opportunity would amount, and will amount, to an unlawful imprisonment, from which relief may be affected by a new habeas corpus."

Thus, courts have not hesitated to condemn the detention of an alien whenever it has appeared, following the lapse of a reasonable time, that his deportation was impossible or could not be effected in the foreseeable future. See *U.S. ex rel. Kusman v. District Director of Immigration and Naturalization at Port of New York*, 117 F.Supp. 541 (S.D.N.Y. 1953); *U.S. ex rel. Ross v. Wallis*, 279 F. 401 (2d Cir. 1922); *Caranica v. Nagle*, 28 F.2d 955 (9th Cir. 1928); *Wolck v. Weedin*, 58 F.2d 928 (9th Cir. 1932); *In re Hanoff*, 39 F.Supp. 169 (D.Cal. 1941); *U.S. ex rel Janavaris v. Nicolls*, 47 F.Supp. 201 (D.Mass. 1942). The United States District Court for the District of Kansas stated that:

> "The rationale underlying these decisions was that detention was intended for the sole purpose of effecting deportation. Once it has become evident that deportation was not realizable in the foreseeable future, the continued detention was found to be without cause."

Fernandez v. Wilkinson, 505 F.Supp. 787, 792 (D.Kan. 1980). Courts have held that approximately two to four months was a reasonable period to detain an alien pending deportation efforts. *Id.* In the wake of these holdings, Congress enacted 8 U.S.C. § 1252(c), which gave the Attorney General six months in which to accomplish the aliens departure.[5] Although, the section has been repealed it does exhibit that at one point in time Congress disapproved of detention beyond the reasonable time necessary to execute a final order of deportation.

Based upon the rationale above, this Court finds that the petitioner's detention of nearly four years with no end in sight, and the probability of permanent confinement, is an excessive means of accomplishing the purposes sought to be served by 8 U.S.C. § 1252(a). The inability of the INS to obtain travel documents for the petitioner within nearly four years troubles this Court. The United States has amicable relationships with Germany and Lithuania. Thus the INS cannot claim that uncertain status between the United States and any one of these countries is the reason for the inability to deport

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[5] 8 U.S.C. § 1252(c) stated in pertinent part as follows: Final Order of Deportation; place of detention. When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or is [sic] judicial review is had, then from the date of the final order of the court within which to effect the alien's departure from the United States, during which period at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other conditions as the Attorney General may prescribe.

and imply that in due time the situation will or may change. The fact of the matter is that the petitioner is not now nor has he ever been a citizen of any country. To say that he is temporarily detained pending deportation is not accurate. The petitioner, a legal alien, will never be deported because there is no place to send him. This fact distinguishes this case from the other cases cited elsewhere in this opinion dealing with aliens awaiting deportation. The petitioner is reminiscent of E.E. Hale's novel, "Man Without A Country," except that his perpetual confinement is in a prison rather than on a ship. This result "shocks the conscience" of the Court.

Accordingly, the Court finds that the petitioner's detention is violative of his constitutional rights to substantive due process.[6]

IV.

CONCLUSION

For the foregoing reasons, IT IS ORDERED that the petitioner's application for writ of habeas corpus is HEREBY GRANTED.

IT IS FURTHER ORDERED that the petitioner, Kestutis Zadvydas, SHALL BE RELEASED from the custody

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[6] The petitioner makes two other arguments relating to his continued confinement pending deportation. The first of these contentions is that the petitioner's right to procedural due process was violated as to his continued confinement. The second contention is that the petitioner's incarceration violates the Eighth Amendment's prohibition against cruel and unusual punishment. However, because of this Court's ruling on substantive due process this Court need not address these claims.

of the INS upon conditions to be set by the Court at a hearing, which shall be held on Wednesday, November 12, 1997 at 9:00 a.m. in Room C-468.

IT IS FURTHER ORDERED that petitioner shall be released within 35 days from the date of such hearing.

EXCERPT FROM REPORT OF PSYCHIATRIC EVALUATION DATED NOVEMBER 19, 1997 (PAGES 3-4)

Family History. Denies mental illness in the family. Father had a drinking problem, no suicide in the family.

Drug/Alcohol History: He claims he drinks occasionally. Had cocaine habit, that is the reason he went to jail.

Social/Person History: Father died 25 years ago of heart attack. Mother living in New York. All of his family live in New York. He claims he has 3 brothers. Patient is a twin. Had 4 sisters. Patient is the middle child in the family. He claims he gets along well with brothers and sisters. Wife lives in Houston and works for the city of Houston. He has a 17 year old daughter. He claims he talks to his family and they write him letters. His wife lives in Houston with his daughter.

Criminal History: Had been in jail before. He said he was 17 years old when he committed armed robbery. He stated that he would not do it anymore.

Sexual History: He said he was physically abused by father but no nightmares. No sexual abuse while growing up.

Mental Status Examinations: During interview patient is wearing tangerine uniform, hand cuffed and in leg chains. Poor eye contact, no abnormal gait, no psychomotor hyperactivities, speech coherent and relevant. No loss of association. He was vocal about his condition. He does not have any country. He is stressed out about what is going on with him in prison. He wants to go home to his family in Houston so that he will be together with his wife and daughter. Mood depressed, affect sad. Not

homicidal, nor suicidal. He does not sleep good because of his condition in jail. He described he is in a room with many other people walking around and it is noisy. Appetite poor, he claimed he lost three and one half pounds because he cannot eat the food they are giving him. He claimed he had been in St. Martinville since November 10, 1997. Denies hallucinations, not delusional during this interview. He is oriented to time, place, person and situation. Recent and remote memory fair. He was able to do simple spelling. He recalled 3 to 3 objects in 5 minutes. Similarly good serial of seven started 93, then he stated he is not good in math. Able to name Clinton, Bush, Reagan and Carter as Presidents of the United States backward. Abstract thinking good, judgment and insight good during this interview. Estimate intellectual function average intelligence. No abnormal involuntary movement during this interview. Assets of this patient: he can communicate well in English and he is physically healthy.

Diagnosis: Axis I: Adjustment Disorder with Mixed Emotional Feature
Axis II: Defer
Axis III: Defer
Axis IV: He is unemployed, did not finish school, has been incarcerated.
Axis V: GAF 90

Recommendation: Individual therapy to overcome his stress and difficulty but he says he does not want to come back and talk to me because he is OK. At the present time he is not dangerous to himself or to others during this interview.

Daniel M. Faculoma, M.D.
11/19/97

MINUTE ENTRY
DECEMBER 17, 1997
FALLON, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KESTUTIS ZADVYDAS	*	CIVIL ACTION
	*	
VERSUS	*	NO. 96-810
JOHN B.Z. CAPLINGER	*	SECTION "L"

Considering the government's motion to alter or amend judgment, IT IS ORDERED that such motion is HEREBY DENIED. In rendering its decision in this matter, the Court was fully aware that petitioner is theoretically eligible to be considered for release by the INS and that he may again and again apply to the INS for a change in custody status. This does not alter the Court's conclusion that this petitioner's detention had no end in sight.

/s/ Honorable Eldon E. Fallon

Date of Entry DEC 19 1997

[SEAL] U.S. Department of Justice
Immigration and Naturalization Service

HQOPS (DDP) 50/10-C

Office of the Executive Associate Commissioner
425 I Street NW
Washington, DC 20536

OCT – 7 1998

MEMORANDUM FOR REGIONAL DIRECTORS

FROM: Michael A. Pearson /s/ Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Detention Guidelines Effective October 9, 1998

As you know, the Immigration and Naturalization Service (INS) supported a legislative proposal for extension of the Transition Period Custody Rules (TPCR). This extension will allow us to continue the exercise of discretion in custody determinations. However, we expect that it will be some time before this discretion is granted with the result that as of October 9, 1998, TPCR discretionary authority will no longer be in effect. Attached with this memorandum are the detention guidelines which will be in effect as of October 9.

I recognize that 100 percent compliance with these guidelines will be virtually impossible to achieve immediately. Furthermore, 100 percent adherence to the guidelines would have major impacts on other program operations which are critical to the overall INS mission. We have met with Congressional staff to advise them of the impacts on our operations resulting from the expiration of TPCR. We have been advised that we may get

future Congressional support for some type of discretionary relief from mandatory detention, but only if we can document and demonstrate that a maximum effort to comply with the detention mandates has been made. Shortly, we will provide you with guidance concerning additional data that we will need to collect and provide to Congress.

At this time, I am directing that, to the extent possible, you adhere to the detention scheme outlined in the attached and work toward utilizing 80 percent of your bedspace for mandatory detention cases. In the event that a District Director, Chief Patrol Agent, or Officer In Charge makes a custody determination which is not in keeping with the guidelines (e.g., a Category 1 case is released to make detention space for a Category 2 or 3), the reasons for the decision must be clearly documented in writing and placed in the alien's file. At any time the mandatory detention occupancy falls below 80 percent of available bedspace, the responsible field manager must notify the Regional Director.

In the event that your District Directors have released someone prior to October 9, who is now subject to detention, nothing in this memorandum should be construed as requiring their rearrest/detention. However, if conditions have changed or circumstances warrant, nothing should preclude you from exercising your authority to rearrest and detain.

Additionally, each Regional Director is directed to prepare a written monthly summary of custody determinations made by field offices within your respective jurisdictions which are inconsistent with the attached

detention guidelines. The monthly summaries will be used to justify our need for continued discretion in detention decisions in our ongoing discussions with the Department of Justice, the Administration, and the Congress. The first monthly summary will be for the month ending October 31. Regions should forward the summaries to this office not later than 1 week after the end of the month.

Attachment

[SEAL] U.S. Department of Justice
Immigration and Naturalization Service

HQOPS 50/10

425 I Street NW
Washington, DC 20536

OCT - 7 1998

INS DETENTION USE POLICY
October 9, 1998

I. INTRODUCTION

This policy governs the detention of aliens and supersedes, the Detention Use Policy issued July 14, 1997. The purpose of this policy is to revise the detention priorities of the Immigration and Naturalization Service (INS) in light of the expiration of the Transition Period Custody Rules (TPCR). Section 236(c) of the Immigration and Nationality Act (INA) is now in full force and effect. With the expiration of the TPCR, certain portions of 8 C.F.R.

§3.19 and §236.1, as noted in those sections, no longer apply.

Under this policy, the four categories of alien detention are: (1) required (with limited exceptions), (2) high priority, (3) medium priority, and (4) lower priority. Aliens in category 1 – required detention – must be detained, with a few exceptions. Aliens in categories 2, 3, and 4 may be detained depending on the availability of detention space and the facts of each case. Aliens in category 2 should be detained before aliens in categories 3 or 4, and aliens in category 3 should be detained before aliens in category 4. The District Director or Sector Chief retains the discretion, however, to do otherwise if the facts of a given case require.

These instructions do not apply to the detention and release of juveniles, which is covered in other INS policies.

II. DEFINITIONS

- *Required detention:* Detention of certain classes of aliens required by the INA or applicable regulations. With few exceptions, aliens subject to required detention must be detained and are not eligible for release.
- *Discretionary detention:* Detention of aliens authorized but not required by the INA or applicable regulations. All aliens in proceedings are subject to discretionary detention unless they fit into one of the categories covered by required detention. Aliens subject to discretionary detention are eligible to be considered individually for release.
- *Final order of removal:* Final removal order issued by an immigration officer, an immigration judge (IJ), the Board of Immigration Appeals, or a Federal judge to an alien placed in proceedings on or after April 1, 1997. INS officers should consult District counsel on issues regarding the finality of removal orders.

- *Final order of deportation or exclusion:* Final deportation or exclusion order issued by an immigration officer, an immigration judge, the Board of Immigration Appeals, or a Federal judge to an alien placed in proceedings before April 1, 1997. INS officers should consult District counsel on issues regarding the finality of deportation or exclusion orders.

III. DETENTION CATEGORIES

A. Arriving Aliens: Expedited Removal under INA §235.

Category 1: Required detention (with exceptions)

- *Aliens in Expedited Removal.* Arriving aliens at Ports-of-Entry who are inadmissible under INA §212(a)(6)(C) or 212(a)(7) are subject to expedited removal proceedings pursuant to INA §235(b)(1). Any alien placed into expedited removal must be detained until removed from the United States and may not be released from detention unless (1) parole is required to meet a medical emergency or legitimate law enforcement objective, or (2) the alien is referred for a full removal proceeding under §240 (for example, upon a finding of "credible fear of persecution"). Although parole is discretionary in all cases where it is available, it is INS policy to favor release of aliens found to have a credible fear of persecution, provided that they do not pose a risk of flight or danger to the community. See INA §§235(b)(1), 8 C.F.R. §235.3.

  Aliens who are ordered removed under expedited removal and who make an unverified claim to United States citizenship, or to lawful permanent

resident, refugee, or asylee status, are referred to an IJ for a status review under 8 C.F.R. §235.3(b)(5)(iv). Such aliens must be detained pending this review, unless parole is required to meet a medical emergency or legitimate law enforcement objective.

If there is insufficient detention space to detain an alien in expedited removal who arrived at a land border Port-of-Entry and claims a fear of persecution unrelated to Canada or Mexico, that alien may be required to wait in Canada or Mexico pending a final determination of his or her asylum claim. If an alien expresses a fear of persecution related to Canada or Mexico, the alien must be detained for proceedings and may not be required to wait in that country for a determination of the claim.

Aliens subject to expedited removal who arrive at a land border Port-of-Entry, but do not claim lawful status in the United States or a fear of persecution, should be processed immediately and detained until removed. These aliens should not be required to wait in Mexico or Canada pending the issuance of an expedited removal order.

The INS may permit an alien in expedited removal to withdraw his or her application for admission.

Note that the INS maintains approximately 1,100 User Fee beds, which are funded by the User Fee Account. The INS can only use these beds for aliens arrested in support of airport operations.

B. Aliens in Proceedings: INA §240 (Removal), §238 (Expedited Removal of Criminal Aliens), Former INA §236 (Exclusion), and Former INA §242 (Deportation).

1. Category 1: Required detention (with exceptions)

- *Aliens subject to required detention in removal and deportation proceedings.* Pursuant to INA §236(c), the INS must take into custody all aliens who are chargeable as terrorists, and virtually all aliens who are chargeable as criminals, upon their release from criminal incarceration or custody. §236(c) does *not* apply to the following groups of aliens who are removable as criminals: (a) aliens who are removable under §237 for a single crime involving moral turpitude, if they were sentenced to less than a year; (b) aliens who are removable under §237 for a conviction for high-speed flight from an immigration checkpoint (18 U.S.C. §758); and (c) aliens who are removable under §237 for crimes relating to domestic violence, stalking, and the abuse or neglect of children.

  §236(c) applies to aliens in both removal proceedings under §240 and deportation proceedings under former §242. Therefore, under §236(c) the INS must continue to detain aliens who are described in that section (by their §237 equivalents) if (a) they were previously taken into custody while in deportation proceedings (i.e., charged under §241 in proceedings commenced prior to April 1, 1997) and (b) they are still in custody upon the expiration of the TPCR. Note that current §236(c) does *not* apply to aliens in exclusion proceedings under former §236.

  Once in INS custody, the alien may be released during proceedings only if the Attorney General determines that it is necessary to protect a witness, a person cooperating with an investigation, or a family member of such a person. To be considered for release in the exercise of discretion, the alien must also demonstrate that release would not pose a danger to persons or property and that the alien

does not pose a flight risk. See the requirements set forth at INA §236(c)(2).

- *Aliens with aggravated felony convictions in exclusion proceedings.* The INS must detain any alien in exclusion proceedings under former §236 (i.e., charged under §212 in proceedings commenced prior to April 1, 1997) who has been convicted of an aggravated felony, as *currently* defined under INA §101(a)(43). The INS may not parole such an alien during exclusion proceedings. Note that the expiration of the TPCR has no effect on these aliens since the TPCR did not apply to them.

2. Category 2: High Priority

- Aliens removable on security and related grounds, if not subject to required detention.
- Other criminal aliens not subject to required detention.
- Aliens who are a danger to the community or a flight risk, if not subject to required detention.
- Aliens whose detention is essential for border enforcement but are not subject to required detention.
- Aliens engaged in alien smuggling, if not subject to required detention.

3. Category 3: Medium Priority

- Inadmissible, non-criminal arriving aliens who are not in expedited removal proceedings and are not subject to required detention.
- Aliens who have committed fraud before the INS, if not subject to required detention.

- Aliens apprehended at the worksite who have committed fraud in obtaining employment, if not subject to required detention.

4. Category 4: Low Priority

- Other removable aliens, if not subject to required detention.
- Aliens originally placed in expedited removal who have been referred for a full removal proceeding under §240 upon a finding of a "credible fear of persecution." See the discussion at section A.1 above regarding the INS policy favoring release.

C. Aliens with Final Orders of Removal, Deportation, or Exclusion.

1. Category 1: Required detention (with exceptions)

- *All aliens who have final orders of removal and all aliens who have final orders of deportation and are subject to required detention.* This category includes all aliens ordered removed under revised §240, whether or not they are terrorists or criminals, and all criminal aliens ordered removed under revised §238. It also includes all terrorist and criminal aliens ordered deported under former §242 if subject to required detention under §236(c).

  Revised INA §241(a) requires the INS to remove within 90 days any of the aliens in this category. The alien may not be released during this 90-day period. See INA §241(a)(2).

  Aliens whom INS is unable to remove within 90 days should be released under an order of supervision. See INA §241(a)(3). However, the INS may continue to detain certain aliens, including, among others, those who are inadmissible on any ground; deportable or removable on criminal or security

grounds; dangerous; or flight risks. See INA §241(a)(6).

- *Aliens with final orders under expedited removal.* The INS must detain aliens who have been issued final orders under expedited removal (revised §235(b)(1)) on grounds of being inadmissible under INA §212(a)(6)(C) or §212(a)(7). Pending immediate removal, the INS must detain such an alien. However, the INS may stay the removal of such an alien if removal is not practicable or proper, or if the alien is needed to testify in a criminal prosecution. See INA §241(c)(2).

- Aliens convicted of aggravated felonies with final orders of exclusion. The INS must continue to detain until removal any alien with a final order of exclusion (i.e., charged under section 212 in proceedings commence prior to April 1, 1997) who has been convicted of an aggravated felony, as *currently* defined under INA §101(a)(43). The INS may not parole such an alien unless the alien is determined to be unremovable pursuant to old INA §236(e)(2) and the alien meets the criteria for release under that provision. See former INA §236(e) (as designated prior to April 1, 1997) and the Mariel Cuban parole regulations at 8 C.F.R. §§212.12 and 212.13.

2. Category 2: High Priority

- *Aliens with final orders of deportation (if not terrorists or criminals subject to required detention under §238(c) and §241(a)) or exclusion (if not aggravated felons).* Aliens placed into proceedings *prior* to April 1, 1997, who were or are ordered deported or excluded, are only subject to required

- detention if terrorists or convicted of certain crimes. See part C.1 above. Otherwise, they are

subject to discretionary detention and, once they have a final order of deportation or exclusion, their detention should ordinarily be a high priority.

Please note that the 6-month rule of former INA § 242(c) and (d), which regards detention and release, continues to apply to these non-terrorists and non-criminal aliens with final orders of deportation. Non-aggravated felon aliens with final orders of exclusion may be paroled from custody to the discretion of the INS.

IV. GENERAL DIRECTIONS

A. Category 1

- Aliens subject to required detention shall have first priority for all available[1] INS detention space.

- With the exceptions noted above, category 1 aliens shall be detained.

- Each Region should ensure that it maintains sufficient non-criminal detention space to provide basic support for its full spectrum of law enforcement objectives. However, with the exception of this basic level of non-criminal detention space, each Region, District,

- and Sector must seek to comply with the detention priorities outlined above.

---

[1] Available detention space means space that is both available and suitable for the detention of the alien in question. For example, an alien terrorist sūbject to required detention would have first priority for all INS beds suitable for the detention of terrorists. No alien should be detained in an INS bed unsuitable for that alien's detention (regardless of the detention category).

If a category 1 alien comes into INS custody but no detention space is available locally, the responsible office should pursue the following options in rank order:

1) acquire additional detention space locally securing funds from the Region if necessary;

2) transfer the alien to another INS District or Region where space or funding is available;

3) release an alien in local INS custody who is not subject to required detention (i.e., an alien in category 2, 3, or 4) to make space for the category 1 alien; or

4) release an alien in INS custody in another District who is not subject to required detention (i.e., an alien in category 2, 3, or 4) to make space for the category 1 alien.

- If a category 1 alien comes into INS custody when all INS criminal beds nationwide (i.e., beds not reserved for juveniles, User Fee operations, or non-criminal detention) are occupied by other category 1 aliens and there are no additional detention funds available, the responsible office should contact its Regional Director to arrange for the release of a lower-priority category 1 alien in order to permit the detention of a higher-priority category 1 alien.

- INA § 236(c) does not require the INS to arrest any alien who is described in that section but was released from criminal incarceration or custody previously. However, if the INS later encounters such an alien in a non-custodial setting and elects to initiate immigration proceedings, the alien is subject to required detention.

- INA § 236(c) does not require the INS to re-arrest any alien who is described in that section but was released from INS custody under the TPCR.

However, the INS may re-arrest such an alien under INA § 236(b) if conditions have changed or if circumstances otherwise warrant.

B. Categories 2, 3, and 4

- Aliens in categories 2, 3, or 4 should generally be detained according to rank, higher priorities before lower priorities. Exceptions to this general rule may be made as follows:

  1) The District Director or Sector Chief may make an exception in individual cases if local circumstances require.

  2) The Regional Director, with the concurrence of the Executive Associate Commissioner for Field Operations, may make an exception to accommodate special regional enforcement initiatives.

  3) The Executive Associate Commissioner for Field Operations may make an exception to accommodate special national enforcement initiatives or to address an emergency.

C. Juvenile Aliens

- This Detention Use Policy does not apply to juvenile aliens or juvenile detention space. Please refer to the instructions for the detention and release of juvenile aliens issued previously.

[LOGO]

LIETUVOS RESPUBLIKOS
AMBASADA
VAŠINGTONAS

EMBASSY OF THE
REPUBLIC OF
LITHUANIA
WASHINGTON, D.C.

October 26, 1998
No. 3873

Mr. John J. Foadre
Attorney-Adviser, Consuler Affairs
The US Department of State

cc: Mr. James English, INS

Dear Mr. Foadre:

Following our meeting on September 8, 1998 at the Embassy of Lithuania in Washington, DC, I would like to bring to your attention the position of the Ministry of Foreign Affairs of Lithuania regarding US request to issue travel documents for Mr. Kestutis Zadvydas, resident of the US.

According to the Law on Citizenship of the Republic of Lithuania, the term "citizenship" is used to indicate the status of being a citizen, as the term "nationality" is perceived as meaning "belonging ethnically to a certain nation", and "nationality" cannot be used as a basis for determining citizenship. According to the law of the Republic of Lithuania, individuals of different nationalities might be citizens of Lithuania. And visa versa – not always ethnic Lithuanians are citizens of Lithuania. According to the norms of the International Law, countries commit themselves to accept deportations of their citizens and permanent residents, and not individuals of certain ethnic origin. It is essential in any case of

intended deportation to Lithuania, whether an individual under question is a citizen or permanent resident of Lithuania, or not, i. e. whether he/she is included into the register of residents of Lithuania, has relevant identification papers.

According to Lithuania law Kestutis Zadvydas can become a citizen of Lithuania only if he expresses his will to be become a citizen in the form of handing in to certain Lithuanian diplomatic or consular office a request and certain required documents, proving that his parents were citizens of the Republic of Lithuania prior to the Second World War.

Sincerely,

/s/ Dalia Grybauskaite
Dalia Grybauskaite
Minister

FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF LOUISIANA
HALE BOGGS FEDERAL BUILDING
501 MAGAZINE STREET, SUITE 318
NEW ORLEANS, LOUISIANA 70130

Virginia L. Schlueter — ***TOLL FREE 1-(800) 296-4046***
Federal Public Defender — ***TELEPHONE (504) 589-2468***
Robert F. Barnard — ***FAX (504) 589-2556***
John H. Craft
Roma A. Kent
Gary V. Schwabe, Jr.
Claude J. Kelly, III
Valerie Welz Jusselin
Assistant Federal Public Defenders

March 19, 1999

Ms. Laura A. Smith
Trial Attorney, Civil Division
Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

Re: Kestutis Zadvydas v. Underdown
U.S.C.A. No. 97-31345 (5th Cir. Pending), Appeal From No. 96-CV-810-L(6), (E.D.La. Nov. 26, 1997)

Dear Ms. Smith:

Please be advised that I have sent Mr. Zadvydas a copy of your March 10, 1999, letter that states that he may apply for Lithuanian citizenship. I have also read the letter to him over the telephone. As you know, Mr. Zadvydas has, as per the court order, stayed in contact with the Immigration and Naturalization Service (INS) in Houston. As a result, I told Mr. Zadvydas that he should bring your letter to the attention of INS there and that he needs to

determine where the nearest Lithuania Consulate is located.

Also, you refer in your letter to a separate letter from the Lithuanian Embassy referencing applying for citizenship. If you could be so kind as to provide me with a copy of that document, I will forward it to Mr. Zadvydas. If you have any forms from Lithuania, I will be glad to forward them to my client.

Sincerely,

ROBERT F. BARNARD
Assistant Federal Public Defender

RFB:lg
cc: Mr. Kestutis Zadvydas

[LOGO]

LIETUVOS RESPUBLIKOS
GENERALINIS
KONSULATAS
NIUJORKAS

CONSULATE GENERAL
OF THE REPUBLIC OF
LITHUANIA
NEW YORK

March 25, 1999
Our ref. 03-05-725

Kestutis Zadvytis
9275 Richmond Suite 101
Houston, TX 77063

Dear Kestutis Zadvytis,

Enclosed please find the forms for applying for issuance of a passport of the citizen of the Republic of Lithuania (a sample form is included). The forms must be fully filled out and returned to the General Consulate of Lithuania in *Chicago* with three (3) passport photos (2"x2" size) ("glossy or matte finish color/Black and white passport photos"). The following documents should also be included:

1. Documentation showing that you (or your parents or grandparents) were a Lithuanian citizen from February 16, 1918 till June 15, 1940. For example, interior or foreign passports issued before June 15, 1940; certificate of identification issued by the Republic of Lithuania; birth certificate if born after 1919; military service card.

2. US identification documents (copy of your Permanent resident Card).

3. If during any time you have changed your name for naturalization, marriage or other reasons, you must provide us with the appropriate documentation showing that change.

4. If you are married, your marriage sertificate [sic] must be included.

5. If you have children younger than sixteen (16), their birth certificates must be included.

Documents that are not issued in Lithuania ***must be notarized***. They will then be legalized by the Consulate.

For all documents written not in the Lithuania language, ***typed translations to the Lithuanian language must accompany them.***

420 FIFTH AVENUE TEL: 212 354 7840
NEW YORK, NY 10018 FAX: 212 354 7911

[LOGO] **U.S. Department of Justice**

Civil Division

DEK:DMM:LAS Telephone: (202) 305-0194
39-33-584

Washington, D.C. 20530

BY FEDERAL EXPRESS

April 1, 1999

Robert F. Barnard, Esq.
Federal Public Defender's Office
501 Magazine Street, Suite 318
New Orleans, LA 70130

Re: Zadvydas v. Underdown, No. 97-31345 (5th Cir. pending), *appeal from* No. 96-CV-810-L(6) (E.D. La. Nov. 26, 1997)

Dear Mr. Barnard:

Enclosed as requested in your letter of March 19, 1999, is a copy of the letter from the Embassy of the Republic of Lithuania setting forth the position of the Ministry of Foreign Affairs regarding the immigration and Naturalization Service's request for travel documents for Mr. Zadvydas.

Please contact me at (202) 305-0194 should you require any further information.

Sincerely,

/s/ Laura A. Smith
LAURA A. SMITH
Attorney
Office of Immigration Litigation
Civil Division, Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

Enclosure

[LOGO]

LIETUVOS RESPUBLIKOS
AMBASADA
VAŠINGTONAS

EMBASSY OF THE
REPUBLIC OF
LITHUANIA
WASHINGTON, D.C.

October 26, 1998
No. 3873

Mr. John J. Foadre
Attorney-Adviser, Consuler Affairs
The US Department of State

cc: Mr. James English, INS

Dear Mr. Foadre:

Following our meeting on September 8, 1998 at the Embassy of Lithuania in Washington, DC, I would like to bring to your attention the position of the Ministry of Foreign Affairs of Lithuania regarding US request to issue

travel documents for Mr. Kestutis Zadvydas, resident of the US.

According to the Law on Citizenship of the Republic of Lithuania, the term "citizenship" is used to indicate the status of being a citizen, as the term "nationality" is perceived as meaning "belonging ethnically to a certain nation", and "nationality" cannot be used as a basis for determining citizenship. According to the law of the Republic of Lithuania, individuals of different nationalities might be citizens of Lithuania. And visa versa – not always ethnic Lithuanians are citizens of Lithuania. According to the norms of the International Law, countries commit themselves to accept deportations of their citizens and permanent residents, and not individuals of certain ethnic origin. It is essential in any case of intended deportation to Lithuania, whether an individual under question is a citizen or permanent resident of Lithuania, or not, i. e. whether he/she is included into the register of residents of Lithuania, has relevant identification papers.

According to Lithuania law Kestutis Zadvydas can become a citizen of Lithuania only if he expresses his will be become a citizen in the form of handing in to certain Lithuanian diplomatic or consular office a request and certain required documents, proving that his parents were citizens of the Republic of Lithuania prior to the Second World War.

Sincerely,

/s/ Dalia Grybauskaite
Dalia Grybauskaite
Minister

MCDERMOTT, WILL & EMERY

May 10, 1999

Mr. Robert Barnard
Federal Public Defender

Thank you for your fax letter, dated April 27, 1999.

I am a Lithuanian lawyer working in the American law firm of McDermott Will & Emery. Among other areas of law, I also practice in the area of Lithuanian immigration law.

I understand that in an October 26, 1998 letter, the Embassy of the Republic of Lithuania stated that:

> According to Lithuanian law Kestutis Zadvydas can become a citizen of Lithuania only if he expresses his will to become a citizen in the form of handing in to certain Lithuanian diplomatic or consular office a request and certain required documents, proving that his parents were citizens of the Republic of Lithuania prior to the Second World War.

You have asked me to address whether the documents which you sent to me are sufficient to prove that Mr. Kestutis Zadvydas' parents were citizens of Lithuania prior to the Second World War, as required by the Lithuanian Embassy. I have examined the following documents:

1. Mr. Zadvydas' mother's baptismal certificate

2. An affidavit of his father stating that he was born in Mazeikial, Lithuania

3. The visa application of Mr. Zadvydas' father to enter the United States

4. Documents recording Mr. Zadvydas' parents marriage which include notarized statements from both parents.

The documents sent by you might be not sufficient to prove the citizenship of K. Zadvydas' parents due to the following reasons:

(1) They do not evidence that K. Zadvydas' mother born on October 31, 1919, was a citizen of the Republic of Lithuania. Moreover, they show that at her birth, the territory she was born in (Memel) belonged to Germany.

(2) None of the documents sent by you contain evidence of the citizenship of S. Zadvydas except for the Sworn Statement of O. Zadvydas and S. Zadvydas notarized on November 15, 1955. The Sworn Statement made by the parents of K. Zadvydas of their own origin (in the absence of other evidence) would, most likely, be not sufficient grounds for the granting of the citizenship by the Migration Department. The criminal record of K. Zadvydas would, most probably, be taken into account.

Yours sincerely,

/s/ Eugenija Sutkiene

FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF LOUISIANA
HALE BOGGS FEDERAL BUILDING
501 MAGAZINE STREET, SUITE 313
NEW ORLEANS, LOUISIANA 70130

[Names And Addresses Omitted In Printing]

May 11, 1999

Ms. Lynne Underdown
District Director
Immigration and Naturalization Services
701 Loyola Street, Room T8011
New Orleans, Louisiana 70113

RE: Kestutis Zadvydas

Dear Ms. Underdown:

I am writing to request that you reconsider your prior decision denying release from custody for my client, Kestutis Zadvydas. Developments in this case over the past eighteen months demonstrate that Mr. Zadvydas is neither a danger to the community nor a flight risk, and thus is eligible for release pursuant to the factors identified in 8 U.S.C. § 241, 8 C.F.R. §§ 241.4 and 241.5, the April 30, 1999, Statement of Commissioner Meissner regarding mandatory review of individuals in indefinite detention (Underdown Letter (hereinafter "UL") Exhibit U.L. A) and the February 3, 1999 memorandum of Executive Associate Commissioner Michael Pearson. (Exhibit U.L. B).

Pursuant to the February 3, 1999, Pearson memo, individuals such as Mr. Zadvydas who cannot be removed because immediate repatriation is not possible

are now subject to consideration for release pursuant to the factors identified in 8 C.F.R. §241.4.

At the time of your office's original decision, it was found that Mr. Zadvydas did not qualify for release because he had failed to establish that he was neither a danger to the community nor a flight risk. Subsequent to that decision, a United States District Court Judge ordered that Mr. Zadvydas be released. The INS proposed six conditions for this release: 1) that a $5000 bond be posted; 2) that Mr. Zadvydas be required to provide evidence of residence or of a family sponsor; 3) that he also be required to provide evidence of employment; 4) that he have medical insurance; 5) that he undergo a psychiatric evaluation; and 6) that, upon release, he be required to report monthly to the INS. In ordering the release of Mr. Zadvydas, the District Court adopted all of the INS' conditions as proposed, with the only modification being a bond of $2000.

Mr. Zadvydas complied with all of these conditions and thus was released from INS custody on or about November 21, 1997. Since that date, he has continued to comply with all conditions. Each of these conditions, as well as other relevant information concerning his conduct subsequent to his release, is discussed below.

The psychiatric evaluation requested as a condition by the INS was performed on or about August 19, 1997, prior to Mr. Zadvydas' release. The psychiatrist who evaluated Mr. Zadvydas was one selected by the INS. Pursuant to his evaluation, the psychiatrist determined that Mr. Zadvydas was neither homicidal nor suicidal. He was also found to have no serious psychiatric problems. His

Global Assessment of Functioning (GAF), which measures an individual's current ability to function in numerous environments, including the home, workplace and community, was found to be a 90. This level of functioning placed Mr. Zadvydas in satisfactory range. Finally, and significantly, the psychiatrist found that Mr. Zadvydas was not at that time a danger to himself or to others. (Exhibit U.L. C).

Prior to his release from custody, Mr. Zadvydas posted the required $2000.00 bond. His brother-in-law, Juan Ferreiro, agreed to be his sponsor and, as such, provided a job for him as a janitor at his business. Mr. Zadvydas continues to be employed at this business, but has since been promoted to the position of floor manager/cashier. With his promotion he also received a raise, from an income of $250.00 per week to that of $400.00 per week. His employer reports that he is dependable and hard-working; that he arrives to work early and completes all jobs that need to be done; and that he is vital to the business. (Exhibit U.L. D).

Mr. Zadvydas has now been living in Houston, Texas under supervised release for almost eighteen months. During that time he has reported faithfully to the Houston INS office as required. Originally, he was ordered to report every four months. At his last report date, he was told that he did not have to report again for seven months. Mr. Zadvydas has not missed any of these report dates.

During the last eighteen months, Mr. Zadvydas has also renewed his ties to the community. He sees his daughter on an almost daily basis and is very active in her life.

(Exhibit U.L. E). He is also involved in his church, attending service on a weekly basis. (Exhibit U.L. F).

The events of the past eighteen months, when coupled with the evidence already in Mr. Zadvydas' file, prove that Mr. Zadvydas has now met his burden of demonstrating that he is neither a danger to the community nor a flight risk.

The fact that Mr. Zadvydas is currently released under supervision pursuant to the order of the District Court does not deprive your office of authority to determine his continued eligibility for supervised release. Nothing in the statute or the regulations requires that an alien be detained for the INS to consider his custody status. Rather, 8 C.F.R. §236.1(D) (2) (ii) (1998) specifically provides that "[a]fter an order becomes administratively final, the respondent may request review by the district director of the conditions of his or her release." This regulation makes no mention that an individual must be physically detained in order to make such a request; to the contrary, it indicates that an alien ordered released can request review of the conditions placed upon his or her release. The INS can also review the custody status. In fact, in Mr. Zadvydas' case, the INS performed precisely such a review when one of its agents changed his reporting requirement from the original four month period to a period of seven months. Thus, under this authority you are also not precluded from determining Mr. Zaadvydas' [sic] eligibility for continued supervised release, notwithstanding the fact that he is currently not in detention.

For all of the reasons explained above, we ask that you reconsider your earlier denial of release to Mr. Zadvydas in light of his dramatically changed circumstances. We look forward to your prompt reply to this request. Please feel free to call if you have any questions.

Sincerely,

/s/ Robert F. Barnard
ROBERT F. BARNARD
Assistant Federal Public Defender
RFB/mbs
attachments
cc: Laura A. Smith
Office of Immigration Litigation

EXHIBIT U.L. "A"

U.S. Department of Justice
IMMIGRATION AND NATURALIZATION SERVICE

STATEMENT 4/30/99

New Mandatory Review Policy For INS Long-Term Detainees

Doris Meissner
Commissioner,
Immigration and Naturalization Service

Effective immediately, all INS district offices have been instructed to perform reviews of individuals who have final orders of removal but whose immediate repatriation is not possible. These reviews will determine eligibility for release of these individuals under authorization provided in the changes in the 1996 immigration law. The mandatory reviews will occur before the expiration of the 90-day removal period. Individuals who are not found amenable to release following the 90-day review will have their cases reviewed every six months thereafter.

Previous INS policy recognized that district directors had the authority to conduct such case reviews. The reviews have now been made mandatory and will be conducted in a regularly scheduled manner.

INS' priority is keeping our communities safe, and no one will be released if he or she is deemed to pose a threat to public safety. However, every individual in long-term detention has a right at any time to request a

review of his or her case, based on a change of circumstances, to determine if release is appropriate. Release decisions will consider criminal and immigration violations, history of violence while incarcerated, evidence of rehabilitation, and ties to the community.

Furthermore, in order to achieve fairness and consistency, INS will put into place uniform, standardized and transparent procedures for the reviews.

INS is committed to ensuring fair and consistent review process that is conducted in a timely, methodical manner. by establishing regularly scheduled reviews, individuals in long-term detention and their families will know when their cases will be reviewed, as well as the procedures for those reviews.

We will continue to work with all parties in the communities we serve to ensure their safety and to further open communication as well as active participation with INS as the agency continues to forge a framework for how to effectively deal with the difficult issue of long-term detention.

- INS -

Prepared by the Office of Public Affairs (202) 514-2648 Internet: www.ins.usdoj.gov

EXHIBIT U.L. "B"

76 INTERPRETER RELEASES March 15, 1999

Appendix II

[seal]

U.S. Department Of Justice
Immigration and Naturalization Service

HQCOU90/16.51

435 I Street NW
Washington, DC 24534

Office of the Executive Associate Coordinator

February 3, 1999

MEMORANDUM FOR REGIONAL DIRECTORS

FROM: Michael A. Pearson /s/ Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: *Detention Procedures for Aliens Whose Immediate Repartriation Is Not Possible or [illegible]*

This memorandum clarifies the authority of District Directors to make release decisions and emphasizes the need to provide a review of administratively final order detention cases both before and after the expiration of the mandatory 90 day detention period at § 241(a)(2) of the Immigration and Nationality Act (INA).

The District Director is required to review every administratively final order removal case before the ninety (90) day removal period mandated by § 241(a)(1) expires. 8 C.F.R. § 241.4 gives the District Director the

authority to make release decisions beyond the removal period based on specific criteria in the regulation as set forth below. The regulation also provides that the District Director should provide an alien with the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order. The alien may be given this opportunity in writing, orally, or a combination thereof. The District Director must ensure that the file is documented with respect to the alien's opportunity to present factors in support of his release, and the reasons for the custody or release decision.

The District Director cannot delegate the authority to render the ultimate custody or release decision beyond those directly responsible for detention within his district or Service Processing Center (SPC). Such individuals may include the Deputy District Director, the Assistant Director for Detention, the Officer in Charge (OIC) of a detention center, or persons acting in such capacities. These persons must be specifically designated by the District Directors.

Although the District Director cannot relinquish his decision-making authority, he may utilize various methods to assist in reaching a determination. For example, he may designate an individual or group of individuals to review the alien file and obtain any other relevant information. To the extent Districts have a high volume of past order cases, the District Director may also request detail assistance from other districts, the region and/or headquarters for the purpose of conducting custody

reviews. The District Director may use information obtained by local staff or detainees to make his custody decision. Detail assistance may be coordinated through John Castro, at Headquarters Detention and Deportation.

Every six months, the District Director must review the status of aliens detained beyond the removal period to determine whether there has been a change in circumstances that would support a release decision since the 90 day review. Further, the District Director should continue to make every effort to effect the alien's removal both before and after the expiration of the removal period. The file should document these efforts as well.

When an alien is released pursuant to 8 C.F.R. § 241.4 under an order of supervision, the order of supervision must specify the applicable conditions of supervision. In addition, the order of supervision must be signed by one of the parties authorized in 8 C.F.R. § 241.4.

Any alien described in 8 C.F.R. § 241.4(a), may be returned to custody subsequent to release under an order of supervision if such alien violates any of the conditions of the order of supervision. Any alien described in 8 C.F.R. § 241.4(b) who violates the conditions of the order of supervision is subject to the penalties described in § 243(b) of the INA.

District Directors are advised that a detention review is subject to the provisions of 8 C.F.R § 236.1(d)(2)(ii) if the alien submits a written request to have his detention status reviewed by the District Director. Under 8 C.F.R. § 236.1(d)(2)(ii), the alien may appeal the District Director's decision to the Board of Immigration Appeals. Where the alien has not made a written request to have

his custody status reviewed, however, there is no provision for appeal of the District Director's decision to the Board of Immigration Appeals. *See* 8 C.F.R. § 241.4.

> 8 C.F.R. § 241.4 Continued detention beyond the removal period.
>
> (a) Continuation of custody for inadmissible or criminal aliens. The district director may continue in custody any alien inadmissible under § 212(a) of the Act or removable under § 237(a)(I)(C), 237(a)(I)(C), 237(a)(2), or 237(a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:
>
> (1) the nature and seriousness of the alien's criminal conviction;
>
> (2) Other criminal history;
>
> (3) Sentence(s) imposed and time actually served;
>
> (4) History of failures to appear for court (defaults);
>
> (5) Probation history;

(6) Disciplinary problems while incarcerated;

(7) Evidence of rehabilitative effort or recidivism;

(8) Equities in the United States; and

(9) Prior immigration violations and history.

(b) Continuation of custody for other aliens. Any alien removable under any section of the Act other than § 212(a), 237(a)(I)(C), 237(a)(2), or 237(a)(4) may be detained beyond the removal period, in the discretion of the district director, unless the alien demonstrates to the satisfaction of the district director that he or she is likely to comply with the removal order and is not a risk to the community.

Note: these instructions also apply to criminal alien deportation cases under former INA § 242 where the aliens are subject to required detention under current INA § 235(a). *See* October 7, 1998 memorandum entitled *INS Detention Use Policy*.

EXHIBIT U.L. "C"

Family History. Denies mental illness in the family. Father had a drinking problem, no suicide in the family.

Drug/Alcohol History: He claims he drinks occasionally. Had cocaine habit, that is the reason he went to jail.

Social/Person History: Father died 25 years ago of heart attack. Mother living in New York. All of his family live in New York. He claims he has 3 brothers. Patient is a twin. Had 4 sisters: Patient is the middle child in the family. He claims he gets along well with brothers and sisters. Wife lives in Houston and works for the city of Houston. He has a 17 year old daughter. He claims he talks to his family and they write him letters. His wife lives in Houston with his daughter.

Criminal History: Had been in jail before. He said he was 17 years old when he committed armed robbery. He stated that he would not do it anymore.

Sexual History: He said he was physically abused by father but no nightmares. No sexual abuse while growing up.

Mental Status Examination: During interview patient is wearing tangerine uniform, hand cuffed and in leg chains. Poor eye contact, no abnormal gait, no psychomotor hyperactivities, speech coherent and relevant. No lapse of association. He was vocal about his condition. He does not have any country. He is stressed out about what is going on with him in prison. He wants to go home to his family in Houston so that he will be together with his wife and daughter. Mood depressed, affect sad. Not Homicidal, not suicidal. He does not sleep good because

of his condition in jail. He described he is in a room with many other people walking around and it is noisy. Appetite poor, he claimed he lost three and one half pounds because he can not eat the food they are giving him. He claimed he had been in St. Martinville since November 10, 1997. Denies hallucinations, not delusional during this interview. He is oriented to time, place, person and situation. Recent and remote memory fair. He was able to do simple spelling. He recalled 3 to 3 objects in 5 minutes. Similarly good serial of seven started at 93, then he stated he is not good in math. Able to name Clinton, Bush, Reagan and Carter as Presidents of the United States backward abstract thinking good, judgments, and insight good during this interview. Estimate intellectual function average intelligence. No abnormal involuntary movement during this interview. Assets of this patient: he can communicate well in English and he is physically healthy.

Diagnosis: Axis I: Adjustment Disorder with Mixed Emotional Feature

Axis II: Defer

Axis III: Defer

Axis IV: He is unemployed did not finish school, has been incarcerated.

Axis V: GAF 90

Recommendation: Individual therapy to overcome his stress and difficulty but he says he does not want to come back to talk to me because he is OK. At the present time

he is not dangerous to himself or to others during this interview.

/s/ Daniel M. Facalona 4/19/99
Daniel M. Facalona, M.D.

DML:da

EXHIBIT U.L. "D"

VERIFICATION OF EMPLOYMENT

EMPLOYEE: KESTUTIS ZADVYDAS

POSITION: FLOOR MANAGER/CASHIER

DATE OF EMPLOYMENT: 12/97 TO PRESENT

KESTUTIS ZADVYDAS IS A DEPENDABLE HARD WORKING EMPLOYEE. HE IS ALWAYS EARLY AND DOES ANYTHING THAT NEEDS TO BE DONE. HE DOES NOT MISS WORK AND GETS ALONG WELL WITH THE OTHER EMPLOYEES. HE IS A VITAL PERSON TO THE BUSINESS.

SINCERELY,

/s/ Jacqueline Chavarria
JACQUELINE CHAVARRIA
GENERAL MANAGER

EXHIBIT U.L. "E"

TO WHOM IT MAY CONCERN:

MY NAME IS LINA ZADVYDAS DAUGHTER OF KESTUTIS ZADVYDAS. EVER SINCE MY FATHER WAS RELEASED FROM INS, MY FATHER HAS BEEN HELPING ME WITH MY SCHOOL AND MY TUITION. HE'S BEEN THERE FOR WHATEVER I NEEDED. HE GIVES ME MORAL SUPPORT AS WELL. HE ALSO HELPS MY MOTHER BY GIVING HER MONEY FOR FOOD AND OTHER STUFF FOR ME. I SEE MY FATHER ALMOST EVERYDAY BECAUSE HE TAKES ME AND PICKS ME UP FROM SCHOOL.

/s/ Lina Zadvydas
Lina Zadvydas

United States Court of Appeals,
Fifth Circuit.

Kestutis ZADVYDAS, Petitioner-Appellee,

v.

Lynne UNDERDOWN; U.S. Immigration and Naturalization Service, Respondents-Appellants.

No. 97-31345.

Aug. 11, 1999.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GARWOOD, DAVIS and BARKSDALE, Circuit Judges.

GARWOOD, Circuit Judge:

Petitioner-appellee Kestutis Zadvydas (Zadvydas) applied for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. He alleged that since he is a stateless person and there is no possibility of effectuating his deportation to another country, his continued detention by respondents-appellants the Immigration and Naturalization Service (INS) and its district director (whose successor, Lynne Underdown, has been substituted as a party respondent-appellee) constitutes punishment without due process of law and thus violates his due process rights and international law. The district court granted the writ and ordered Zadvydas released from custody. *Zadvydas v. Caplinger*, 986 F.Supp. 1011 (E.D.La. 1997). We reverse.

Facts and Proceedings Below

Zadvydas was born in a displaced persons camp in Germany in 1948. In 1956 he immigrated with his family to America, and became a resident alien. Despite his long residence in this country, he never became a citizen.[1] Starting as a youth, Zadvydas developed an extensive criminal history. His FBI records indicate numerous arrests. In 1966 he was convicted of attempted robbery in New York. In 1974 he was again convicted in New York, this time of attempted burglary. The INS began the process of deportation in 1977, based on these two convictions. While those proceedings were pending, Zadvydas was released into the community. After a lengthy delay, Zadvydas' motion for relief from deportation under 8 U.S.C. § 1182(c) was denied on February 10, 1982. Facing a hearing before an immigration judge that year, Zadvydas disappeared. Over the next decade, the INS failed to locate Zadvydas.

In 1987, authorities in Virginia arrested Zadvydas for possessing 474 grams of cocaine with intent to distribute. According to his own testimony, Zadvydas used cocaine at that time. While on bail awaiting trial in Virginia, Zadvydas fled to Houston, Texas. After several years in Texas, Zadvydas voluntarily presented himself to Texas authorities, and he was subsequently tried in Virginia on the 1987 distribution charge. In 1992, he was convicted and sentenced to sixteen years' imprisonment, with six years suspended. After serving only two years, Virginia

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[1] The record does not reveal whether Zadvydas ever applied for citizenship.

released him on parole. The INS promptly took him into custody and reinitiated deportation proceedings. In March 1994 the immigration judge ordered that Zadvydas should be detained without bond during the deportation process based on his history of flight from authorities. Zadvydas appealed that determination, but the Board of Immigration Appeals (BIA) affirmed the immigration judge.

In 1994 Zadvydas appeared before the immigration judge. He admitted his past criminal history, conceded deportability, and seemed to indicate that he was a German citizen. He applied for relief from deportation under 8 U.S.C. § 1182(c). In May 1994 the immigration judge denied relief from deportation and ordered Zadvydas to be deported. Zadvydas did not appeal that decision, does not challenge it here, and it has become final. The INS immediately contacted the German government to arrange for deportation. German officials, however, proved unwilling to accept Zadvydas. They took the position that under German law the mere fact Zadvydas was born on German soil did not automatically entitle him to German citizenship. The INS, while continuing to forward requests to Germany, contacted Lithuanian authorities in July 1994. The Lithuanians tersely responded that they could not accept Zadvydas since he was neither a citizen nor a permanent resident of Lithuania.

In May 1995, after the INS had forwarded to German authorities all the material they believed was necessary to establish Zadvydas' citizenship, the German authorities declined to accept Zadvydas. Referencing extensive research that they assertedly had conducted, they declared that Zadvydas was not a German citizen and

thus could not be deported to Germany. Subsequent communications with the German authorities apparently did not generate a response. Based on the fact that Zadvydas' wife is a citizen of the Dominican Republic, the INS apparently wrote Dominican authorities. No Dominican response is in the record. In October 1996, the INS again contacted Lithuania to ascertain whether Zadvydas could claim citizenship. The Lithuanian government has since responded by stating that Zadvydas, while not one of their citizens, could apply for citizenship if he could prove that both of his parents were born in Lithuania prior to 1940. In letters dated October 26, 1998, and March 25, 1999, the Lithuanian government has broadly outlined the type of documentation it would require, and stated that Zadvydas should present such materials to it.

In September 1995, Zadvydas filed the instant petition for a writ of habeas corpus under section 2241, claiming that his continued detention violated the Eighth Amendment, the due process clause, and international law. In February 1997 the magistrate judge recommended denial of Zadvydas' habeas petition. Zadvydas filed objections. In November 1997 the district court found that continued detention of Zadvydas was unconstitutional. The court rejected all of Zadvydas' challenges to his deportation and the denial of his request for relief under section 1182(c), and it further ruled that his continued detention was authorized by 8 U.S.C. former § 1252(a)(2)(B) because he had not shown "that he is not a threat to the community and that he is likely to appear at

any scheduled hearing." 986 F.Supp. at 1024.[2] However, concluding that Zadvydas was "stateless" and thus could "never be deported because there is no place to send him", the court held that Zadvydas could not be "permanently incarcerated" without violating his substantive due process rights. While the INS had procedures to review continuing detention, and Zadvydas thus could possibly be released in the future, the court discounted this possibility, finding that in practice there was "no end in sight" for Zadvydas' detention. 986 F.Supp. at 1027. The court ordered Zadvydas released under a list of conditions it generated. The INS timely appealed.[3] While this appeal has been pending, Zadvydas seems to have complied with the district court's release conditions and

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[2] Former section 1252(a)(2)(B) provided:

"The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings."

The district court further observed in this connection that the INS had also interviewed Zadvydas and reviewed his file and determined not to then release him under the similar standards of the Transition Period Custody Rules pursuant to section 303(b)(3)(B) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. 986 F.Supp. at 1024-5 n. 4. The INS had determined thereunder that Zadvydas was "a threat to security as well as a flight risk."

[3] Zadvydas has not cross-appealed.

has apparently conducted himself as a productive member of society.

Discussion

The district court found that given the uncertainty that any nation would be found that would accept Zadvydas, his detention was indefinite. It further found that such indefinite detention violated his substantive due process rights. The law, at least in this Circuit, regarding the long-term detention of excludable aliens pending deportation is clear – such detention is allowable. *See, e.g., Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1448 (5th Cir. 1993). Zadvydas argues, however, that these cases can have no application to his status since he is a resident alien and thus can claim enhanced constitutional protection. He maintains that even if the government may detain an excludable alien indefinitely, it violates substantive due process to inflict such detention on a resident alien such as himself.[4] The INS argues, however,

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[4] Zadvydas also claims that his continued detention violates both international treaties and customary international law proscriptions of arbitrary detention. We do not believe that the continued detention here could be described as arbitrary. In any case, we rejected an identical international law claim in *Gisbert*. *See Gisbert*, 988 F.2d at 1448. We are unaware of any presently relevant distinction in international law between excludable and resident aliens, so for the purposes of adjudicating the application of international law *Gisbert* is directly controlling. Zadvydas' claims that his procedural due process and Eighth Amendment rights are violated by his continued detention were expressly not reached by the district court (986 F.Supp. at 1027 n. 6) and were not argued before us. We do not address them here.

that once a resident alien such as Zadvydas is concededly in adherence with procedural and substantive due process – ordered deported and that order becomes final, the resident alien may claim no greater rights than an excludable alien in like circumstances. To the extent that the circumstances of this case require us to follow their logic, we agree with the INS.

I. Preliminary Matters

As a threshold matter, we must address the question of this Court's jurisdiction. Although the INS contested the district court's jurisdiction below, it has not done so on appeal. We must nevertheless examine our own jurisdiction independently before proceeding. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S.Ct. 1055, 1072, 137 L.Ed.2d 170 (1997). Congress has clearly indicated that it desires minimal judicial intrusion into deportation decisions. The strictest jurisdictional standard under which Zadvydas' claims could be evaluated are provided by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, 110 Stat. 309-546, which repealed the prior judicial review schemes governing immigration and substituted new provisions potentially applicable to Zadvydas. See 8 U.S.C. § 1252(g).[5] The Supreme Court has recently

[5] Section 1252(g) provides:

"(g) Exclusive Jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

construed the jurisdictional effect of section 1252(g). *See Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999). In *Reno*, the Court held that the enactment was not a general bar, but rather limited judicial review of a narrow class of discretionary executive actions. By the statute's terms, one of the actions immune from review is an action to "execute removal orders against any alien under this chapter." In a recent case, the Seventh Circuit has held that these provisions do not remove our jurisdiction to hear a section 2241 habeas petition challenging the validity of the statutes authorizing the detention of aliens. This is because the detention, while intimately related to efforts to deport, is not itself a decision to "execute removal orders" and thus does not implicate section 1252(g) under *Reno*. *See Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999). We agree, and find jurisdiction to hear this appeal.

We next must address the statutory regime governing Zadvydas' continued detention. Zadvydas was released into INS custody in 1994. Since that time, a flurry of statutory changes have taken place. Zadvydas' detention could be covered by one of four separate detention regimes, depending on the degree of retroactivity involved. Two of them, the rule in place when he was initially detained, see 8 U.S.C. § 1252 (1994), and the Transition Period Custody Rules authorized in IIRIRA, place the

burden on a detainee awaiting deportation to prove that he is not a danger to the community or a flight risk before being released on parole pending deportation. The third, most recent, provision – IIRIRA's permanent provision – authorizes detention but makes it discretionary beyond an initial ninety day period. *See* IIRIRA § 305(c), codified as 8 U.S.C. § 1231(a)(6), Immigration and Nationality Act (INA) § 241(a)(6).[6] From a constitutional perspective, the choice between these regimes appears to be of at most marginal import. However, the rules established by the immigration provisions of the Anti-Terrorism and Effective Death-Penalty Act (AEDPA) order mandatory detention of all aliens awaiting deportation, regardless of danger or flight risk. See AEDPA, Pub.L. 104-132 § 440(c), 110 Stat. 1214, 1277 (amending 8 U.S.C. § 1252(a)(2) to delete provisions allowing release of nondangerous non-flight-risk detainees).

The parties agree that AEDPA § 440(c) does not apply, and both maintain that this case is governed by the new section 241 established by the IIRIRA, which they argue applies to all aliens who are not "in proceedings" at its effective date. It would seem clear that Zadvydas is not in deportation proceedings – the order regarding his deportation was issued and became final long before IIRIRA's effective date, and only the physical act of deportation remains undone. Moreover, the rapid passage of IIRIRA in the immediate wake of AEDPA seems to indicate that Congress repudiated the harsh mandatory

[6] Certain classes of aliens, including criminal aliens such as Zadvydas, "may be detained beyond the [90 day] removal period." 8 U.S.C. § 1231(a)(6).

detention regime created by AEDPA for aliens whose deportation is final. To apply AEDPA to Zadvydas based solely on the accident of when proceedings against him began would seem to make little sense – there is no reason to suspect that Congress determined that aliens in custody prior to the effective date of IIRIRA were, as a class, significantly more dangerous than those subsequently taken and thus merited harsher treatment. While the statute currently is not a model of clarity[7] in respect to its retroactive application to an alien in Zadvydas'

[7] IIRIRA's retroactivity clause, section 309(c)(1), bars application of its provisions "in the case of an alien who is in exclusion or deportation proceedings before" its effective date. The statute's section dealing with retroactivity is generally phrased in the present tense. The title to the section is, for example, "Transition for Aliens in Proceedings," and the clause applies to an alien who "is in" proceedings at the effective date. The natural reading of the clause would thus seem to be that it applies only to proceedings that are pending as of the effective date. *See American-Arab*, 119 S.Ct. at 943 (defining transitional cases under section 309(c)(1) as "cases pending on the effective date of IIRIRA"). *See also id.* at 945 (referring to "§ 309(c)(1)'s general rule" that IIRIRA's provisions "do not apply to pending cases"). The problem is created by the statute's usage of "before," which might be read to imply that the statute only affects those that were free of any involvement in deportation proceedings prior to the effective date. The confusing "before" was, however, the product of what was labeled as a "technical" amendment established by the Hatch-Kennedy amendment to the H-1A Nursing Bill. See Pub.L. 104-302, 110 Stat. 3657. Nothing indicates what the goal of this amendment was, and the failure of the amendment to change the surrounding language makes its intended purpose unclear. Accordingly, we find the text ambiguous enough to merit consideration of *Chevron*, particularly in light of the seeming absurdity of a contrary result and the constitutional problems it might possibly create.

position, we find the INS' construction reasonable. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We conclude that Zadvydas' detention is governed by the new provisions of section 241.

Because we agree with the parties that new INA section 241 applies, we will proceed to analyze the constitutional question presented under the assumption that Zadvydas will be able to obtain periodic review of his detention. Under INA § 241(a)(1) & (2), 8 U.S.C. § 1231(a)(1) & (2), the Attorney General is required to remove an alien from the United States within the "removal period," defined generally as the ninety days beginning when an order of removal becomes administratively final, when any judicial review thereof is completed, or when the alien is released from confinement (other than under an immigration process), whichever is latest, and is required to detain the alien during the removal period. If the alien is not removed within the removal period, "the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General." *Id.* § (a)(3). INA § 241(a)(6), 8 U.S.C. § 1231(a)(6) provides:

> "An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2)[8], or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community

[8] 8 U.S.C. § 1227(a)(2), INA § 237(a)(2), includes aliens, such as Zadvydas, convicted of an aggravated felony or a controlled substance violation.

> or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." (Emphasis added).

INS regulations, see 8 C.F.R. §§ 236.1(d)(2)(ii), 236.1(d)(3)(iii), 241.4 & 241.5, as explained and expounded in the February 3, 1999, "Memorandum for Regional Directors" from INS Executive Associate Commissioner Michael A. Pearson concerning "Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable," authorize the release of such aliens when it is determined that the alien "is not a threat to the community and is likely to comply with the removal order," and further provide that the alien must be given the opportunity to so demonstrate, that every six months the District Director must "review the status of" such "aliens . . . to determine whether there has been a change in circumstances that would support a release decision," that the alien's file must be documented to show "the reasons for the custody or release decision," and that "if the alien submits a written request to have his detention status reviewed by the District Director . . . the alien may appeal the District Director's decision to the Board of Immigration Appeals."[9]

[9] The Pearson memorandum states in pertinent part:

> " . . . 8 C.F.R. § 241.4 gives the District Director the authority to make release decisions beyond the removal period based on specific criteria in the regulation as set forth below. The regulation also provides that the District Director should provide an alien with the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the

The district court found that the INS did not err in determining that Zadvydas posed a danger to the

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community and is likely to comply with the removal order. The alien may be given this opportunity in writing, orally, or a combination thereof. The District Director must ensure that the file is documented with respect to the alien's opportunity to present factors in support of his release, and the reasons for the custody or release decision.

. . .

Every six months, the District Director must review the status of aliens detained beyond the removal period to determine whether there has been a change in circumstances that would support a release decision since the 90 day review. Further, the District Director should continue to make every effort to effect the alien's removal both before and after the expiration of the removal period. The file should document these efforts as well.

. . .

District Directors are advised that a detention review is subject to the provisions of 8 C.F.R. § 236.1(d)(2)(ii) if the alien submits a written request to have his detention status reviewed by the District Director. Under 8 C.F.R. § 236.1(d)(2)(iii) [sic], the alien may appeal the District Director's decision to the Board of Immigration Appeals. Where the alien has not made a written request to have his custody status reviewed, however, there is no provision for appeal of the District Director's decision to the Board of Immigration Appeals. See 8 C.F.R. § 241.4."

8 C.F.R. § 241.4(a) provides:

"(a) Continuation of custody for inadmissible or criminal aliens. The district director may continue in custody any alien inadmissible under section 212(a) of the Act or removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) of the Act, or who presents a

community and a flight risk. Should Zadvydas no longer do so, he would doubtless be released.

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significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:

(1) The nature and seriousness of the alien's criminal convictions;

(2) Other criminal history;

(3) Sentence(s) imposed and time actually served;

(4) History of failures to appear for court (defaults);

(5) Probation history;

(6) Disciplinary problems while incarcerated;

(7) Evidence of rehabilitative effort or recidivism;

(8) Equities in the United States; and

(9) Prior immigration violations and history."

The release of an alien under section 241.4 shall be under a supervision order requiring, inter alia, periodic reporting to the INS, continued efforts to obtain travel documents, advance approval of travel beyond any therein specified limits, and giving notice of change of address; a bond may also be required; and, the INS "may grant employment authorization to an alien" released under section 241.4. See C.F.R. § 241.5.

II. *Gisbert* and Excludable Aliens

Article 1, section 8, clause 4 of the Constitution vests in Congress the power to "establish an uniform Rule of Naturalization." Moreover, "[t]he exclusion of aliens is a fundamental act of national sovereignty" that "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950). *See also Chae Chan Ping v. United States*, 130 U.S. 581, 9 S.Ct. 623, 630, 32 L.Ed. 1068 (1889) (discussing sovereignty justification). The basic source of this interest is identical regardless of whether the government seeks to exclude an alien who has not entered, or to expel an alien who has resided here. *See Fong Yue Ting v. United States*, 149 U.S. 698, 13 S.Ct. 1016, 1019, 37 L.Ed. 905 (1893) ("The right of a nation to expel or deport foreigners who have not been naturalized . . . is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."). When these principles are taken together, it is clear that "the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 1478, 52 L.Ed.2d 50 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S.Ct. 625, 628, 97 L.Ed. 956 (1953)). *See also Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952) ("It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such

matters are so exclusively entrusted to the political branches as to be largely immune from judicial inquiry or interference."). The power of the national government to act in the immigration sphere is thus essentially plenary.

Aliens can of course claim some constitutional protections. The language of the due process clause refers to "persons," not "citizens," and it is well established that aliens within the territory of the United States may invoke its provisions. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886); *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 981, 41 L.Ed. 140 (1896) (illegal resident alien could not be punished by sentence to hard labor without due process of law). While the cases have drawn a line for some purposes between excludable aliens who failed to effect entry into the country unimpeded and resident aliens, in this Circuit it is clear that the former also can be considered persons entitled to protection under the 14th Amendment. *See Lynch v. Cannatella*, 810 F.2d 1363, 1375 (5th Cir. 1987) ("Excludable aliens are not non-persons."). We cannot suppose that the result in *Wong Wing* would have been different had the alien there been excludable rather than resident.

However, alien status can affect our analysis of constitutional rights. Because of their special position, certain classifications and restrictions that would be intolerable if applied to citizens are allowable when applied to resident aliens. *See, e.g., Cabell v. Chavez-Salido*, 454 U.S. 432, 102 S.Ct. 735, 740, 70 L.Ed.2d 677 (1982) (state's exclusion of resident aliens from basic governmental functions did not

violate the constitution).[10] *See also DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). More importantly for the issue before us, courts have long recognized that the governmental power to exclude or expel aliens may restrict aliens' constitutional rights when the two come into direct conflict. *See Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 1891, 48 L.Ed.2d 478 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."). Indeed, the Court has accepted collateral damage to the constitutional rights of citizens as an acceptable price to pay in deference to the plenary power over aliens of the political branches of the national government. *See Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 2582-84, 33 L.Ed.2d 683 (1972) (recognizing citizen audience had First Amendment interest in listening to communist agitator, but accepting government's exclusion of alien speaker despite this interest). *See also United States v. Williams*, 194 U.S. 279, 24 S.Ct. 719, 48 L.Ed. 979 (1904).

Zadvydas claims that his detention amounts to punishment without trial, and thus violates his substantive due process liberty interest. It is well established that resident aliens may not be punished in this manner. *See*

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[10] Further, "the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." *Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 1895, 48 L.Ed.2d 478 (1976). Thus, provisions in state laws respecting aliens which would be invalid under the Fourteenth Amendment are not necessarily invalid when contained in federal legislation. *Id.* at 1893-95.

Wong Wing, 16 S.Ct. at 981. However, the *Wong Wing* court distinguished between the unconstitutional act before it – which made illegal presence in the country summarily punishable by a sentence to being "imprisoned at hard labor" for not more than a year and provided that the alien would be "thereafter removed from the United States" (emphasis added) – and detention pending deportation. "Proceedings to exclude or expel would be in vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation." *Id.* at 980. We have clearly held that excludable aliens may be detained pending deportation without such detention constituting unconstitutional punishment, even when the aliens' country of origin indicates it will not accept their return. *See Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1448 (5th Cir. 1993). *See also Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir. 1995) (en banc) (accord with *Gisbert*).

Gisbert dealt with the detention of a group of Cubans who were part of the Mariel boatlift. After detaining these aliens prior to entry – thus ensuring that they were excludable aliens – the United States decided that they should be returned to their country of origin. Castro refused to accept their return, however, and the aliens were released on immigration parole. Due to the working of the "entry fiction,"[11] the aliens retained their

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[11] The fact that, for humanitarian or administrative reasons, the government chooses to allow excludable aliens into the country while their cases are pending does not alter their status if they were initially properly detained at the border. *See, e.g., Ahrens v. Rojas*, 292 F.2d 406, 410 (5th Cir. 1961).

excludable status despite their freedom on American soil. All of the aliens in *Gisbert* then committed, and were convicted of, crimes while on parole. After their release from the criminal justice system, the aliens were detained pending deportation to prevent any further criminal acts. In *Gisbert*, as under the provisions here, there was a procedure that allowed the detained alien to be released from detention while deportation was still impractical. *See id.* at 1443 n. 11 (detailing annual review procedures that allowed release of aliens found not to present a danger to the community).

The aliens did not challenge the conditions of their confinement or the procedures used in the initial decision to deport them. They instead argued that their continued confinement constituted punishment without a criminal trial and thus violated their substantive due process rights. They emphasized the fact that in light of Castro's refusal to accept their deportation, their confinement was potentially indefinite. We rejected these arguments and held that the continued, indefinite detention of the aliens did not violate their constitutional rights. In reaching this result, we relied on the Court's decision in *Mezei*, in which it allowed the indefinite detention of an excludable alien who had been ordered permanently excluded and could find no nation to receive him. *See Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956. Drawing on the reasoning of *Mezei*, we found that detention pending deportation does not constitute punishment, since the detention could rationally be seen as a necessary byproduct of the need to expel an unwanted alien rather than a punitive decision. *Gisbert*, 988 F.2d at 1442. The continued detention of

Mariel Cubans thus did not constitute punishment without trial in violation of the aliens' substantive due process rights, even though there was no guarantee that deportation could be effectuated in the near future.

Zadvydas attempts to distinguish *Gisbert* and *Mezei* on the ground that he is a resident alien, and thus is entitled to a greater degree of substantive due process protection than the excludable aliens in those cases. Zadvydas' resident alien status surely entitled him to greater procedural rights in the determination of whether he was entitled to remain in the United States than were granted the excludable aliens in those cases. However, Zadvydas does not challenge here the procedures used by the government in deciding to deport him, or the final result. His only complaint is with the detention itself. As explained in part IV below, we do not believe that the difference between excludable aliens and resident aliens mandates a radical departure from the reasoning of *Gisbert* when, as here, a final decision to deport the once resident alien has been made and stands unchallenged.

III. Permanent Confinement

The district court held that Zadvydas' detention violated his substantive due process rights because it constituted "permanent confinement" in that he "will never be deported because there is no place to send him." 986 F.Supp. at 1026, 1027. We conclude that these reasons considerably overstate the matter.

To begin with, Zadvydas may be released when it is determined that he is no longer either a threat to the

community or a flight risk, and he is entitled to automatic review of his case for this purpose every six months, with opportunity to present factors in support of his release, and, where his written application for release has been denied by the district director, he may appeal that decision to the BIA. *See* note 9, *supra*, and accompanying text. In *Barrera-Echavarria*, the en banc Ninth Circuit concluded that analogous annual INS administrative review for release under similar standards precluded characterization of the alien's detention as " 'indefinite' or 'permanent.' " 44 F.3d at 1450.[12]

Nor can it now be said with any real assurance that Zadvydas "will never be deported." To be sure, it is clear that due to an unfortunate combination of circumstances, locating a country to which Zadvydas may be deported has been and will be difficult at best; but that there is no meaningful possibility of doing so has not been clearly established. And, precisely because of the complexities involved, more time than usual will doubtless in any event be required.

The problem of deporting Zadvydas has its roots in the tortured twentieth century history of what is now Lithuania. Up until the German defeat in World War One, portions of Lithuania were located in Germany. Zadvydas' mother was born in that section of modern Lithuania – then known as the Memel region, now called Klaipeda – in 1919. Six years earlier (according to his own

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[12] We also note that at a certain point – which Zadvydas may be approaching – age alone would likely weigh heavily against an INS finding of continued danger to the community or flight risk.

account in an affidavit prepared to secure his post-war immigration to America), Zadvydas' father had been born in Mazeikiai, which is located on the Baltic coast outside of the disputed Memel region and thus would presumably have been under Russian control at the time of his birth. As part of the Versailles Treaty, Germany ceded the Memel region to the Allies. Lithuania, having renewed its existence as an independent state, successfully laid claim to the area and occupied it in 1923. At that point, Zadvydas' mother and father presumably would both have been Lithuanian citizens, since they were apparently born within the resurrected nation's current borders.

However, in 1939 Germany issued an ultimatum to Lithuania demanding the return of the Memel region, referencing the alleged plight of ethnic Germans under Lithuanian rule. The territory was then handed back to Germany, and (if she was still living in the region) Zadvydas' mother then would have become a subject of Nazi Germany. Unlucky in neighbors, Lithuania then had its independence extinguished by Stalin's 1940 invasion, which placed Zadvydas' father in the Soviet orbit (again, presuming he lived near his claimed home town at the time). *See generally* Algimantas Gureckas, Lithuania's Boundaries and Territorial Claims Between Lithuania and Neighboring States, 12 N.Y.L. Sch. J. Int'l & Comp. L. 107 (1991). Hitler then invaded the Soviet Union in 1941, and Lithuania was under German occupation for most of the Second World War. Late in that conflict, the Soviet army reoccupied Lithuania. The Soviets did not reestablish the Lithuanian independence they had earlier snuffed out, and Lithuania remained a captive to Soviet tyranny until

1991. In the midst of all this, Zadvydas' parents were married in 1943. At some point, the couple moved (or fled) to Germany, where their first child was born in 1944. The family spent the immediate post-war years in displaced person camps in Germany. On Nov. 21, 1948, Zadvydas was born in one of these camps. In 1956 the family immigrated to America.

Due to these events, Zadvydas may in a sense be stateless. While born in Germany, he cannot claim German citizenship on that basis alone, because under German law citizenship hinges on blood (jus sanguinis) rather than place of birth (jus soli). Lithuania would seem to be the obvious alternative. Lithuanian sanguinis may be able to substitute for Zadvydas' birth outside of Lithuania. According to the communications from the Lithuanian government, Zadvydas can apply for Lithuanian citizenship if both his parents were born in Lithuania prior to the Soviet invasion in 1940.[13]

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[13] Lithuania's citizenship laws are apparently designed to give preference to ethnic Lithuanians over the large number of ethnically Russian immigrants who established themselves in the years of communist occupation. The requirement of proving birth of one's ancestors in Lithuanian territory neatly differentiates the two populations. *See* Ruta M. Kalvaitis, Citizenship and National Identity in the Baltic States, 16 Bos. U. Int'l L.J. 231 (1998). This seems to be merely a variant of the jus sanguinis principal. It should be noted that the blood citizenship laws that must be navigated here would appear to administratively function somewhat differently from American birth citizenship laws. Because birth alone is not sufficient, it appears that under Lithuanian practice one (or one's parents) has to affirmatively apply for citizenship. The fact that Lithuania is asserting that Zadvydas must apply for citizenship may thus not be unusual. It does seem to have caused some confusion in the communications between the INS and Germany and Lithuania. The INS continually asked for confirmation that Zadvydas was a citizen, rather than framing the matter as an application for citizenship. Given the circumstances of Zadvydas' birth, it would seem unlikely that his parents paused to put him in the national registry of either country. While perhaps understandable, this confusion may have slowed the process here.

According to their own accounts, both parents would qualify under this standard. The difficulty that has so far delayed the process seems to be the need to document this fact. There is a baptismal certificate indicating his mother's birth in the Memel region, which is now part of Lithuania.[14]

However, there is no corresponding documentation demonstrating that Zadvydas' father was born in Mazeikiai. The only evidence that has been unearthed up to this point is his affidavit upon entering the United States, which claimed birth in Lithuania.

The Lithuanian government, in letters dated October 26, 1998, and March 25, 1999, indicated that Zadvydas might apply for citizenship, but would have to personally

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[14] Zadvydas attempts to argue that the fact that at the time Zadvydas' mother was born the status of the Memel region was unsettled indicates that she could not claim Lithuanian citizenship. Nothing in the record supports this theory, and it would seem contrary to ordinary practice. *See* Restatement Third, Restatement of the Foreign Relations Law of the United States § 208, comment c; *id.* Reporters' Note 3 ("Normally, the transfer of territory from one state to another results in a corresponding change in nationality for the inhabitants of that territory"). While there is some evidence that Zadvydas's mother considered herself stateless, or German, this may not accurately track Lithuanian nationality law.

and formally request it, and present documentation of his parent's birth. The INS had previously presented most of the available documentation – the baptismal certificate and Zadvydas' father's affidavit – in its communications with Lithuania. It is not clear, however, whether these materials were examined by the Lithuanians as support for an application for citizenship, rather than as part of a claim that Zadvydas already possessed citizenship. Certainly there has been no definitive denial by Lithuania of any application for citizenship by Zadvydas. Accordingly, it is premature to assume that the Lithuanians will reject Zadvydas based on the current documentation. Even if they were to demand more reliable evidence of his father's birthplace, there is no basis on which to conclude that more cannot be uncovered. After all, it does not seem disputed that he was born in what became Lithuania. For example, a search of the public records in Mazeikiai or elsewhere (so far apparently unperformed anywhere by anyone) might prove fruitful. To be sure, such efforts may ultimately prove unsuccessful. And even if unimpeachable evidence of Lithuanian parentage is produced, there is a hint in the record that Lithuania might be able to reject Zadvydas' application based on his criminal record. However, there is no basis for finding that any ability of Zadvydas to become a Lithuanian citizen, and hence deportable there, has been definitively foreclosed.

Also, apart from Lithuania, two other potential options appear to remain unexplored. The record indicates that the German government, in a letter dated May 1995, has definitively rejected the INS' efforts to deport Zadvydas to Germany and mentioned "extensive research" establishing that he is not a German citizen. If –

as it appears – the only evidence put forth by the INS was Zadvydas' birth in Germany, this decision would seem justified under the jus sanguinis principle. However, it would seem that another argument, as yet apparently untapped, might properly be advanced to justify Zadvydas' German citizenship. Zadvydas may in fact have German blood, and thus qualify under jus sanguinis.

After World War Two, German law allowed members of ethnic German communities – some of which, such as the "Volga Germans," had been separated from Germany proper for centuries – to claim citizenship under far more lenient terms than applied to foreigners generally. *See* Note, Deutschland ist Doch ein Einwanderungsland Geworden: Proposals to Address Germany's Status as a "Land of Immigration," 30 Vand. J. Transnat'l L. 905, 916-923 (1997). Zadvydas' mother was born in the Memel region in 1919. Prior to its defeat in World War One, this region was part of Germany. It would thus seem reasonably possible that Zadvydas' mother could be considered an ethnic German – indeed, her birth documentation is in German, not Lithuanian or Polish. It lists her maiden name as Steffan, and her mother's maiden name as Jackshies. It is not obvious to us that these are non-Germanic names. Perhaps Zadvydas could apply for German citizenship claiming ethnic German ancestry.[15] Obviously, the success of such an approach is far from assured – and

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[15] There is nothing to indicate that the mother's potential German ethnicity would in any way affect parallel efforts to obtain Lithuanian citizenship. Lithuania's laws appear to be solely focused on the problem of Russian immigrants.

even if Zadvydas' ethnic status can be shown, his presence in the United States, lack of language skills, or what seems to be his father's likely un-Teutonic ethnicity might defeat such an application. But *see id.* at 923 ("Judicial interpretation and administrative application of the statutes governing naturalization of ethnic Germans have established that the threshold for proving oneself to be an ethnic German is very low.").

A final potential option, apparently completely unexplored, is to attempt to claim Russian citizenship for Zadvydas. Wherever Zadvydas' parents were born, it seems undisputed that their birthplaces would have been inside the borders of the Soviet Union at its post-war height. Russia has apparently been liberal in granting citizenship to former citizens of the Soviet Union now living outside of Russia's borders. *See* Kalvaitis, National Identity in the Baltic States, 16 Bos. U. Int'l L.J. at 240 n. 64. It is noted in an INS affidavit that Zadvydas' mother travels to Russia frequently. Before the immigration judge Zadvydas seemed to indicate that these visits were to visit family.[16] An INS letter indicates the Zadvydas's mother has a sister in Russia whom she visits every year. If Zadvydas does indeed have an aunt living in Russia, he might perhaps qualify for citizenship there. The record does not reveal the details of this apparent family relationship, nor does it contain a discussion of Russian citizenship law. Again, then, success obviously cannot be

[16] When the immigration judge asked whether Zadvydas was aware of any relatives he might have in Germany on his mother's side who she was in contact with, Zadvydas replied "no, she goes to Russia."

presumed. The point is that the record indicates that there may be some slight possibility of this, and that this possibility is apparently wholly unexplored.

As the preceding discussion indicates, the unfortunate historical context of Zadvydas' birth makes untangling his true nationality highly difficult and time consuming at best. But that does not mean impossible. Continued efforts might eventually produce a breakthrough with Lithuania – and, if required, further proof of his father's birth may ultimately be unearthed. And avenues for claiming German and Russian citizenship remain unexplored. Nor is it clear that the Dominican situation has been fully explored. While the delay here is long, it appears to be what one could expect given the tangled circumstances and inadequate documentation. Given the traditional deference we show to the other branches in matters of immigration policy, judicial intrusion should not be considered, particularly where there are reasonable avenues for parole, until there is a more definitive showing that deportation is impossible, not merely problematical, difficult, and distant. However, it is certainly no clearer here that Zadvydas "will never be deported because there is no place to send him" than it was respecting the aliens in *Gisbert*, and here, as also in *Gisbert*, 988 F.2d at 1447, the government is continuing its efforts to effect Zadvydas' removal.

IV. Substantive Due Process and Detention of a Resident Alien Validly Ordered Deported

Zadvydas argues that as a resident alien he has greater rights under these circumstances than an

excludable alien would, and thus that his current detention is a form of punishment unjustified by any criminal conviction despite the result in cases such as *Mezei* and *Gisbert* involving excludable aliens. However, there is little, if any, room for a distinction between the rights in this respect of excludable and resident aliens when their circumstances are so similar. Zadvydas' detention is currently within the core area of the government's plenary immigration power and thus does not violate substantive due process.

The differences that exist in the rights of excludable and resident aliens are not the product of some bright line division that places excludable aliens beyond the pale of constitutional scrutiny. Excludable aliens are persons, entitled to some due process, and other, constitutional protections. The fact that they are entitled to a lesser degree of procedural due process in proceedings to determine whether they may enter the country stems ultimately not from their status as such, but rather from the nature of what is asserted. An attempt to enter this country is a request for a privilege rather than an assertion of right. *See Landon v. Plasencia*, 459 U.S. 21, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982). Denial of entry is thus not a deprivation of rights subject to procedural due process, and that, coupled with our deference to the other branches, mandates that we leave it to Congress to determine the procedures to be used in adjudicating such claims. *See, e.g., Knauff*, 70 S.Ct. at 313 ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). In practice, this determination may foreclose most constitutional challenges on behalf of excludable aliens and create the

impression that they have no constitutional rights. They have no procedural rights with regard to their entry, and most of their substantive rights will be constrained by the government's need to control immigration. *See, e.g., Gisbert*, 988 F.2d at 1448. Since many will never enter the country or will do so only briefly, they will have little opportunity to assert *Yick Wo*-type rights in matters unconnected to the plenary power. However, to the extent that their substantive rights are infringed – either during the immigration process or while they are on parole subject to the entry fiction – in a manner that cannot be connected to the immigration power, they may assert such rights. *See Lynch*, 810 F.2d at 1374-75 (excludable aliens are persons, and thus allowed to bring suit against allegedly brutal government agents since "we cannot conceive of any national interests that would justify the malicious infliction of cruel treatment").

Resident aliens, by virtue of their presence here, develop an interest in remaining that, to a certain extent, entitles them to procedural due process before they may be removed from this country. *See, e.g., Landon*, 103 S.Ct. at 329 (in a discussion limited to procedural due process rights, noting "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation [citations], and, . . . we developed the rule that a continuously present

permanent resident alien has a right to due process in such a situation.").[17]

However, the fact that resident alien status entitles one to due process respecting the decision to deport does not mean that the plenary power concept is extinguished. On the contrary, the needs of the government are taken into account in evaluating such claims and the standard for evaluating procedures is thus lower than would be expected in analyzing the rights of a citizen with a like interest. *See Landon*, 103 S.Ct. at 330 (resident alien who has not severed her ties to the country is entitled to due process before being removed, but in evaluating procedures "it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative"); *Galvan v. Press*, 347 U.S. 522, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954) (noting that while deportation of a long term resident alien is drastic measure with consequences analogous to those stemming from a criminal conviction, plenary power precedent mandates nonapplicability of the ex post facto clause); *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 3483, 82 L.Ed.2d 778 (1984) (deportation, despite the weighty interests involved, is a civil proceeding and not subject to the same battery of procedural protections as would govern a criminal trial); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 44 S.Ct. 54, 56, 68 L.Ed. 221 (1923) (involuntary confession admissible in deportation hearing).

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[17] Indeed, as *Landon* reflects, those rights extend to resident aliens seeking reentry after a brief trip abroad not meaningfully interruptive of the alien's continued United States residence. *Id.* 103 S.Ct. at 329-330.

Nothing in these cases suggests that a resident alien has a broadly privileged constitutional status relative to excludable aliens, or is constitutionally entitled to more favorable treatment when both the right asserted and the governmental interest are identical to those in the parallel case of an excludable alien.[18] The constitutional rights of resident aliens may certainly be affected by the plenary power. *See, e.g., Fong Yue Ting*, 13 S.Ct. at 1026 (in case involving rights of a resident alien, distinguishing *Yick Wo* on the grounds that "[t]he question there was of the power of a state over aliens continuing to reside within its jurisdiction, not of the power of the United States to put an end to their residence in the country"); *Wong Wing*, 16 S.Ct. at 981 (drawing distinction between "the power of congress to protect, by summary methods, the country from the advent of aliens . . . or to expel such if they have already found their way into our land, and unlawfully remain therein" and the decision to imprison aliens at hard labor for a term notwithstanding the ability to rapidly remove the alien from the national community). Both excludable and resident aliens have the right to be free of abuses that – while tangentially and remotely related to the immigration process – cannot be justified as in furtherance of immigration goals. *See Lynch*, 810 F.2d at

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[18] In *Landon*, the court noted that a resident alien had greater substantive rights under the immigration statutes. *See Landon*, 103 S.Ct. at 326. In *Gisbert*, we referenced this discussion of statutory treatment and concluded that resident aliens "generally are granted greater substantive rights than are excludable aliens." *Gisbert*, 988 F.2d at 1440. Nothing in this discussion can be read to imply that there is an across-the-board difference in the constitutional (as opposed to statutory or regulatory) status of the two categories of aliens.

1375 (excludables); *Wong Wing*, 16 S.Ct. at 981 (resident). But both excludable and resident aliens may come in conflict with the government's sovereignty interests, and when this occurs their rights are constrained accordingly and to the same extent. As applied to detention pending removal, any here relevant constitutional distinction between excludable and resident aliens who have each been properly and finally determined to be removable would necessarily rest on a conclusion that excludable aliens are nonpersons wholly unprotected by the Constitution. However, that conclusion would conflict with our holding in *Lynch* and would require us to conclude that aliens in the position of those in *Gisbert* could be statutorily subjected to the rack and the screw, the Eighth Amendment notwithstanding.

In the circumstances presented here, the national interest in effectuating deportation is identical regardless of whether the alien was once resident or excludable. When a former resident alien is – with the adequate and unchallenged procedural due process to which his assertion of a right to remain in this country entitles him – finally ordered deported, the decision has irrevocably been made to expel him from the national community. Nothing remains but to effectuate this decision. The need to expel such an alien is identical, from a national sovereignty perspective, to the need to remove an excludable alien who has been finally and properly ordered returned to his country of origin. *See Fong Yue Ting*, 13 S.Ct. at 1022 (the "power to exclude aliens, and the power to expel them, rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power"). Whether the

party to be deported is an excludable or a former resident, the United States has properly made its decision and earnestly wishes – if for no other reason than to save the cost of detention – to deport the detainee. And deportation itself is not punishment. *See INS v. Lopez-Mendoza*, 104 S.Ct. at 3483 ("The purpose of deportation is not to punish past transgressions, but rather to put an end to a continuing violation of the immigration laws."); *American-Arab*, 119 S.Ct. at 947 ("Even when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act (criminal charges may be available for that separate purpose) but is merely being held to the terms under which he was admitted. And in all cases, deportation is necessary in order to bring to an end an ongoing violation of United States law.").

The fact that deportation cannot be immediately effectuated would not seem to recreate a distinction in the government's interest regarding excludable aliens and resident aliens. When deportation is somehow blocked, the government must worry about two things. If the alien is not detained, he may commit crimes against the general population -- crimes he would have been unable to commit had the decision to deport been effectuated. The whole point of earmarking criminal aliens for deportation or exclusion is that while we must tolerate a certain risk of recidivism from our criminal citizens, we need not be similarly generous when it comes to those who have not achieved citizenship. Their presence in this country is thus a continuing violation of the immigration laws, and if the preferred method of ending this violation is unavailable, detention may be an acceptable alternative

mechanism to achieve the ultimate goal. *See Gisbert*, 988 F.2d at 1442 (noting protection of society from potentially dangerous alien was a rational, nonpunitive purpose for detention). *See also Tran v. Caplinger*, 847 F.Supp. 469, 476 (W.D.La. 1993) ("This court can find no logical basis to conclude that the detention of a deportable alien under these circumstances is 'punishment' while the detention of an excludable alien is not").[19] In addition, when deportation becomes feasible, the alien may frustrate the process by disappearing within the country, as so many have done. If the government's efforts eventually make deportation feasible, it will be unable to effectuate its

[19] Pre-trial detention of citizens charged with a serious crime – but presumptively innocent – may be justified by the government's interest in protecting the public. *See United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 2103, 95 L.Ed.2d 697 (1987). The Court has allowed indefinite detention of a citizen as long as there has been a finding of continued danger and "some additional factor" is present. *See Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 2080, 138 L.Ed.2d 501 (1997). In *Hendricks*, the special circumstance or additional factor was a diagnosis of pedophilia, and the Court upheld a statute that allowed indefinite detention of such persons as long as periodic review was available to certify that the detainee remained dangerous and mentally ill. *Cf. Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 1788, 118 L.Ed.2d 437 (1992) (indefinite detention of person acquitted by reason of insanity after medical diagnosis indicated he was no longer mentally ill could not be justified by danger alone). *See also Gisbert*, 988 F.2d at 1441 n. 6 (distinguishing *Foucha* on the grounds it involved a citizen and a case where "the basis for holding him in that facility had ceased to exist"). We note this only to demonstrate that detention of certain classes of persons to protect society at large is not wholly alien to our constitutional order and has been allowed in special situations when, as here, there are procedures to insure that detention must be periodically reviewed.

decision to expel if the alien has fled and gone underground in the interim. These interests are both equally potentially present regardless of whether an alien was once resident or excludable.

Once the decision is made to deport a resident alien, then, there is little, if any, difference in the government's interest in effectuating deportation of a resident alien and expulsion of an excludable alien. There is thus nothing to adequately distinguish the plenary interest from the one encountered in *Gisbert*. To the extent that Zadvydas had greater rights than the excludable aliens there, such rights were, so far as here relevant, procedural rights respecting the deportation decision, and have concededly been honored. We hold that the government may detain a resident alien based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place.[20]

[20] We are aware of the recent joint opinion of five district judges in the Western District of Washington in *Binh Phan et al. v. Reno et al.* (Nos. C98-2342, C99-177C, C99-185R, C99-341WD, & C99-151L, W.D. Wash. July 9, 1999), which reaches a contrary result. We decline to follow that decision because it rests on a categorical distinction between the detention pending expulsion of deportable aliens who have been finally and properly ordered deported and the detention pending expulsion of excludable aliens who have been finally and properly ordered removed, a distinction which for these purposes we have rejected for the reasons stated in the text.

Conclusion

For the reasons stated, the judgment of the district court is

REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 97-31345

KESTUTIS ZADVYDAS

Petitioner – Appellee

v.

LYNNE UNDERDOWN; US IMMIGRATION AND NATURALIZATION SERVICE

Respondents – Appellants

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING EN BANC

Before GARWOOD, DAVIS, and BARKSDALE,

Circuit Judges

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that eh [sic] court be polled on Rehearing En Banc (FED.R.App.P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

[OMITTED IN PRINTING]

ENTERED FOR THE COURT:
/s/
United States Circuit Judge

Supreme Court of the United States

ZADVYDAS, KESTUTIS V.
UNDERDOWN, LYNNE, ET AL.

No. 99-7791.

Oct. 10, 2000.

The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The case is consolidated with No. 00-38, *Reno v. Ma*, and a total of one hour is allotted for oral argument.

Dec 24, 2000

(8)

Supreme Court, U.S.
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No. 99-7791

In The

Supreme Court of the United States

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN and
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Does the Due Process Clause prohibit the prolonged indefinite detention of petitioner after entry of a final deportation order when deportation is not reasonably foreseeable.

2. To avoid a substantial constitutional question, should this Court construe 8 U.S.C. § 1231(a)(6) to authorize only a reasonable period of detention after a deportation order because the statute is silent as to length of confinement.

LIST OF PARTIES

1. Kestutis Zadvydas
2. Lynne Underdown
3. The Immigration and Naturalization Service

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The decision of the United States Court of Appeals for the Fifth Circuit is reported as ***Zadvydas v. Underdown***, 185 F.3d 279 (5th Cir. 1999), *cert. granted*, ___ U.S. ___, 121 S.Ct. 297 (2000). (J.A. 192) The decision of the United States District Court for the Eastern District of Louisiana is reported as ***Zadvydas v. Caplinger***, 986 F. Supp. 1011 (U.S.D.C., E.D.La. 1997). (J.A. 111). The Report and Recommendation of the Magistrate is unreported. (J.A. 70).

JURISDICTION

The decision of the Court of Appeals was announced on August 11, 1999. The order denying the petition for rehearing was issued on October 13, 1999. (J.A. 229). The petition for certiorari was filed on January 11, 2000. Certiorari was granted on October 10, 2000. (J.A. 230). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . " U.S. CONST. amend. V.

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1231(a)(3) provides as follows:

> If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien –
>
> (A) to appear before an immigration officer periodically for identification;
>
> (B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;
>
> (C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and
>
> (D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

(Appendix I, p.A-16)

8 U.S.C. § 1231(a)(6)[1] provides as follows:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal,

[1] The predecessors to U.S.C. § 1231(a)(6) as quoted herein are set forth in the Appendix to this brief.

> may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

(Appendix F, p.A-12)

8 U.S.C. § 1253(b) provides as follows:

> An alien who shall willfully fail to comply with regulations or requirements issued pursuant to section 241(a)(3) [8 USCS §§ 1231(a)(3)] or knowingly give false information in response to an inquiry under such section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

(Appendix J, p.A-18)

STATEMENT OF THE CASE

(i) Procedural History.

On September 15, 1995, Kestutis Zadvydas filed a *pro se* Petition for Writ of Habeas Corpus in the Western District of Louisiana contesting his continued detention pending deportation by the United States Immigration and Naturalization Service (INS). (R.A.,[2] Vol.1, pp.29-35.) On February 28, 1996, a United States District Judge in the Western District of Louisiana transferred this case to the Eastern District of Louisiana when Mr. Zadvydas was transferred from a federal detention center in Oakdale, Louisiana, to the Orleans Parish Community Correctional Center, a local prison in New Orleans, Louisiana. (R.A., Vol.1, p.22.) The United States Magistrate Judge for the

[2] Hereinafter, R.A. refers to record on appeal.

Eastern District of Louisiana conducted an evidentiary hearing on September 27, 1996. On February 3, 1997, the United States Magistrate Judge issued his Report and Recommendation denying habeas corpus relief. (R.A., Vol.3, pp.709-732.) (J.A. 70).

After objection, on October 30, 1997, the district court issued its Order and Reasons which rejected the Magistrate's Report and Recommendation. The district court held that Mr. Zadvydas's continuing detention violated substantive due process. (R.A., Vol.3, pp.521-556.) (J.A. 111). To determine if he should be released, the court ordered a psychiatrist to examine Mr. Zadvydas for dangerousness. On November 19, 1997, a psychiatric report was issued finding Mr. Zadvydas not dangerous to himself or others. (J.A. 148). On November 26, 1997, the district court entered judgment granting the writ of habeas corpus and pursuant to 28 U.S.C. § 2241 ordered him released from confinement.

The government timely filed a Notice of Appeal. (R.A., Vol.4, pp.788-790.) On August 11, 1999, the United States Court of Appeals for the Fifth Circuit reversed the district court's decision. (J.A. 192) On October 13, 1999, that court denied a petition for rehearing. (J.A. 229). It issued a stay of the mandate pending filing of this writ. Mr. Zadvydas timely filed this petition for writ of certiorari with this Court, which was granted on October 10, 2000 and consolidated for purposes of oral argument with the government's petition in ***Ma v. Reno***, 208 F.3d 815, *reh'g denied*, (9th Cir. 2000), *cert. granted*, 121 S.Ct. 297 (2000). (J.A. 230) As a consequence whereof, the instant brief is filed.

(ii) Statement of Facts

Kestutis Zadvydas is not a citizen of any country. Although he was born on November 21, 1948, in a displaced persons' camp in a region of Germany governed by the United States, he is not a German citizen. Although his parents came from Lithuania, Mr. Zadvydas is not a Lithuanian citizen.

Mr. Zadvydas has resided continuously in the United States since he was eight years old. On September 24, 1956, this country issued an immigrant visa to Kestutis Zadvydas, his father, Stasys, his mother, Ona, and his five siblings under § 3 of the Refugee Relief Act of 1953 and Section 221 of the INA (Immigration and Naturalization Act). (J.A. 4). Since the admission of this refugee family in 1956, Mr. Zadvydas married and fathered a daughter. He presently resides with his daughter, Lina, who is an American citizen. He speaks only English, having been educated in American schools. His mother and numerous siblings also live in the United States and are citizens.

Mr. Zadvydas was convicted in New York of attempted robbery in 1966 and of attempted burglary in 1974. The INS began deportation proceedings in 1977 as a result of these convictions, but when he moved, he did not receive notice of the hearing in 1982. When he failed to appear, proceedings were suspended. During the next ten years, Mr. Zadvydas worked and personally appeared at the INS requesting a duplicate green card when his was lost. The INS reissued his green card. In 1992, he was convicted of possession with the intent to distribute cocaine. When he was released on parole after serving two years of his sentence, the INS took Mr. Zadvydas into

custody and resumed deportation proceedings. The INS detained Mr. Zadvydas in early 1994 without bond based upon his 1992 conviction. An immigration judge found Mr. Zadvydas deportable, denied his request for a waiver, and ordered him deported to Germany on May 2, 1994. Mr. Zadvydas did not appeal. He was returned to detention in Oakdale, Louisiana, to await deportation, and later transferred to a prison in New Orleans.

The INS has been unable to obtain travel documents for Mr. Zadvydas. Initially, the INS approached the Federal Republic of Germany. On May 12, 1995, Germany refused to give him a passport because he was not a German citizen.

The INS also made several equally unsuccessful formal requests to Lithuania. Because Mr. Zadvydas could not establish Lithuanian citizenship or permanent residency, Lithuania refused to issue travel documents. The Lithuanian Consulate General suggested that Mr. Zadvydas apply for citizenship with proof that both parents were born in Lithuania before 1940.

In 1998, he applied through the INS and supplied Lithuania with all available family documents: his mother's Lithuanian baptismal certificate, his father's affidavit stating that he was born in Lithuania in 1913, records of his parents' marriage in Lithuania, and his own visa application for entry to the United States showing that he was "stateless," having been born in a displaced persons' camp. Lithuania found those documents

insufficient and denied him entry. At the INS's instruction in March of 2000, Mr. Zadvydas reapplied for Lithuanian citizenship and resubmitted the same documents.[3] Lithuania has never responded.

In 1996, the INS petitioned the Dominican Republic to admit Mr. Zadvydas because his wife was born in that country. The Dominican Republic did not respond. There is no evidence that Mr. Zadvydas would be accepted by the Dominican Republic.

During these repeated efforts to find a country that would accept him, Mr. Zadvydas remained in prison for over four years. It was not until the district court judge granted his writ of habeas corpus on October 30, 1997, that he was released. He remains free on bond, has reported faithfully to the INS as instructed, and has conducted himself as a productive member of society, as noted by the Fifth Circuit. ***Zadvydas,*** at 284. He will return to prison if this Court rules against him.

SUMMARY OF ARGUMENT

I.

Arbitrary detention is the hallmark of a police state. Freedom from physical restraint is the prerequisite to all other liberties. Hence, as a society, we carefully circumscribe the reasons a person can be confined, and we are wary of slippage. We are careful not to compromise our

[3] The application will be lodged with the Clerk of the United States Supreme Court.

principles about when confinement is and is not acceptable.

The INS confined Mr. Zadvydas for four years after he was ordered deported. Had the district court not granted his writ of habeas corpus, he would now have been incarcerated for over six years. The INS still has not found a country willing to accept him. As the district court noted, he is a man without a country.[4] The prospects of a host country emerging are dim. Consequently, deportation is not reasonably likely in the foreseeable future. As the likelihood of deportation fades, so too does the need to assure that Mr. Zadvydas is available for removal. Only one reason for continued detention remains: the INS's prediction that Mr. Zadvydas will commit further crime. Preventive detention based solely on predicted dangerousness runs afoul of substantive due process.

A. This case concerns an individual's liberty, one of the most fundamental protections provided by the Bill of Rights. Because Mr. Zadvydas's fundamental right to be free from physical restraint is at issue, his continued detention demands review under the heightened standard of constitutional scrutiny. That Mr. Zadvydas is a non-citizen under order of deportation does not warrant a lower standard of scrutiny because whether he continues to be detained does not involve matters of national sovereignty.

B. When deportation is not reasonably foreseeable, the government's interest in effectuating removal and its

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[4] E.E. Hale's novel, *Man Without A Country.*

ancillary interest in preventing flight become attenuated. Only the government's interest in preventing recidivism remains. This Court has held that a finding of dangerousness, standing alone, is not sufficient to justify indefinite detention. ***Foucha v. Louisiana***, 504 U.S. 71, 80 (1992) and ***Kansas v. Hendricks***, 521 U.S. 346 (1997). With deportation unlikely, Mr. Zadvydas's confinement can no longer be tolerated because it is based on prevention of danger alone.

C. The government's interest in continuing to detain Mr. Zadvydas is remote because it is unlikely that deportation will occur. Despite numerous attempts by the INS to obtain travel documents, no country will accept him. Given that Mr. Zadvydas's removal is not reasonably foreseeable, his detention is excessive in relation to the government's interests. Accordingly it violates substantive due process.

D. The INS custody review procedures do not cure the substantive due process violation because they omit consideration of key factors in the balancing test from the director's decision to detain.

E. Reasonable and more narrowly tailored alternatives to incarceration exist. An alien who has not been removed within 90-days may be released and placed on supervision. 8 U.S.C. § 1231(a)(3). Any failure to abide by the strict conditions of release on supervision may subject the deportee to criminal prosecution. 8 U.S.C. § 1253(b). Given these alternatives to detention, due process forbids the INS from detaining Mr. Zadvydas.

F. The Fifth Circuit erroneously equated a long-time resident of the United States and persons stopped at the

border, contrary to this Court's jurisprudence. By stripping long-term residents of the substantive due process protections traditionally afforded them and allowing Mr. Zadvydas's continued detention, the circuit court radically departed from the rule that prolonged incarceration cannot be based on future dangerousness alone. This Court should reject that departure and reaffirm that long-term residents, like citizens, are protected by the due process principle that people are jailed for what they have done, not for what they might do.

II.

This Court may avoid answering this substantial constitutional question simply by interpreting 8 U.S.C. § 1231(a)(6) as authorizing detention for only a reasonable time to effectuate removal. At present, the INS maintains that the statute effectively gives it the discretion to detain deportees in excess of 90 days without judicial review. It is hornbook law that whenever possible courts should construe statutes in a manner to avoid the danger of unconstitutionality. ***Ohio v. Akron Center for Reproductive Health***, 497 U.S. 502, 514 (1990).

A. Although the statute gives the district director the authority to detain in excess of 90 days, the statute is silent as to how far beyond the 90 days the INS can arbitrarily continue the confinement. Reading into the statute authority to detain indefinitely violates a principle of statutory construction. This principle cautions against reading implied authority into a statute when congressional intent cannot be clearly discerned. ***United States v. Price***, 361 U.S. 304, 310-311 (1960).

B. A review of the statute's history and evolution demonstrates that it should be interpreted as authorizing detention for only a reasonable period of time after the entry of a final order. The predecessor statutes made detention pending deportation mandatory. By amending the statute to grant discretion to the INS to release a deportee, Congress signaled its intent that detention not be indefinite.

C. This interpretation of the statute is consistent with precedent: historically, federal courts have read a "reasonable time limitation" into the INS's authority to detain aliens. Before 1950, when there was no statutorily imposed duration of post-order detention, federal courts allowed detention for a reasonable time, generally not exceeding four months.

ARGUMENT

I. THE DETENTION OF MR. ZADVYDAS VIOLATES HIS RIGHT TO SUBSTANTIVE DUE PROCESS BECAUSE DEPORTATION IS NOT REASONABLY LIKELY IN THE FORESEEABLE FUTURE.

A. Because Mr. Zadvydas's Detention Deprives Him of a Fundamental Liberty Interest, It is Subject to Heightened Due Process Scrutiny.

At issue is the quintessential liberty interest: freedom from confinement. "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action." ***Foucha v. Louisiana***, 504 U.S. 71, 80 (1992). The Court has always stressed the fundamental nature of a person's

right to be free from physical restraint. ***United States v. Salerno***, 481 U.S. 739, 749 (1987). Therefore, this Court must review Mr. Zadvydas's incarceration under heightened constitutional scrutiny. The infringement of his liberty interest must fall unless it is narrowly tailored to serve a compelling governmental interest. ***Reno v. Flores***, 507 U.S. 292, 302 (1993).

That Mr. Zadvydas is a non-citizen neither undercuts the fundamental nature of his liberty interest, nor relegates his right to be free from bodily restraint to the vagaries of a lesser standard of protection. For over a century, this Court has recognized that immigrants residing within the territorial boundaries of the United States are entitled to constitutional protections. ***Yick Wo v. Hopkins***, 118 U.S. 356 (1886).

> The rights of the petitioners . . . are not less because they are aliens and subjects of the emperor of China. . . . The fourteenth amendment to the constitution is not confined to the protection of citizens. . . . These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . . .

Id. at 368. Although this Court defers to the political branches of government in matters of substantive immigration policy, this case does not involve such matters. It is not about the decision to deport. Nor is it about detention incident to removal because Mr. Zadvydas's removal is not reasonably foreseeable. Rather, this case is about the manner in which Mr. Zadvydas, a long-time resident, will remain in the United States: in prison or under

supervised release. This decision does not implicate national sovereignty interests, and hence the plenary power doctrine has considerably less force. Therefore, this Court should review Mr. Zadvydas's continued incarceration with heightened scrutiny.

B. When Deportation is Not Reasonably Foreseeable, Continued Detention is Unconstitutional Because Its Only Justification is Future Dangerousness.

Due process of law contains "a substantive component, which forbids the government to infringe certain fundamental interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." ***Reno v. Flores***, 507 U.S. 291, 301-302 (1995) (emphasis in original). In the context of detention without trial, the Court has applied a two-part test for a substantive due process violation: (1) whether detention was imposed for the purpose of punishment or regulation; and (2) if regulation, whether it is excessive to the government's regulatory goal. ***Salerno***, 481 U.S. at 746.

Incarceration, no matter what the reason, appears punitive to the person incarcerated. Mr. Zadvydas testified at his habeas corpus hearing that for four years, he was confined to his cell 20 hours a day and allowed only two hours of exercise per week. (J.A. 41).

The government justifies detention as a means to effectuate removal by eliminating flight risk and preventing recidivism. However, when removal is not foreseeable, detention is not incident to removal. The weight of

the governmental interest in detaining a deportee to preclude flight diminishes as the likelihood of deportation dims. The need to assure that the deportee is available for departure becomes as remote as departure itself. The only remaining justification for detention is to prevent recidivism.

This Court consistently has held future dangerousness insufficient, standing alone, to justify indefinite detention. In ***Foucha v. Louisiana***, 504 U.S. 71 (1992), the Court held that insanity acquittees must be released from confinement to a psychiatric hospital unless they are both mentally ill and dangerous. Dangerousness alone was not enough to continue holding them. In ***Kansas v. Hendricks***, 521 U.S. 346 (1997), the Court upheld a Kansas commitment statute only because it required a showing of mental abnormality preventing the subject from controlling his dangerousness. The Court repeated: "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite civil commitment." ***Id.*** at 357.

The Court approved pretrial detention on the basis of future dangerousness in ***Salerno***, but only where the detention was of limited duration, the statutory scheme was narrowly tailored with procedural safeguards, and the decisionmaker was a judicial officer. 481 U.S. at 750-52. By contrast, the detention scheme at issue here has none of these safeguards. Its duration is not limited. Under INS's interpretation of the statute, it gives the Attorney General unfettered discretion in deciding who to detain. The implementing regulation, 8 C.F.R. § 241.4 (Appendix H, p.A-14), puts the burden on the detainee to demonstrate by clear and convincing evidence that he is

not dangerous before the INS may even consider releasing him. The decision maker is the INS district director, not a neutral judge or magistrate. Furthermore, the regulation omits from the director's periodic reviews of continued detention consideration of both the length of detention, and the future likelihood of deportation being effected.[5] ***Id.*** This is not the narrowly tailored statutory scheme approved in ***Salerno***.[6]

The restriction on Mr. Zadvydas's liberty is further exacerbated by its length. Mr. Zadvydas was detained for four years after entry of the removal order. But for the district court's grant of habeas corpus, his incarceration would now have stretched into six years. This Court has

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[5] Unlike the Bail Reform Act at issue in ***Salerno***, a wide range of crimes trigger the statutory presumption that an alien is a danger to the community. 18 U.S.C. § 3142. Even crimes with a maximum penalty of only one year in prison are now deemed "aggravated felonies" and subject deportable aliens like Mr. Zadvydas to the possibility of indefinite and permanent detention. In contrast, under the Bail Reform Act, the presumption of dangerousness is triggered only for certain crimes, such as drug cases involving a possible sentence of ten or more years. Generally under the Bail Reform Act, the government bears the burden of convincing a neutral decisionmaker that "no conditions of release can reasonably assure the safety of the community." ***Salerno***, 481 U.S. at 750.

[6] Numerous lower courts have held that pretrial detention in excess of strict time limits is excessive under such circumstances. *E.g.*, ***United States v. Gonzales Claudio***, 806 F.2d 334, 343 (2d Cir. 1986); ***United States v. Accetturo***, 783 F.2d 382, 388 (3d Cir. 1986); ***United States v. Hare***, 873 F.2d 796, 801 (5th Cir. 1989); ***United States v. Portes***, 786 F.2d 768 (7th Cir. 1986); ***United States v. Gelfuso***, 838 F.2d 358 (9th Cir. 1988); ***United States v. Theron***, 782 F.2d 1510, 1516 (10th Cir. 1986).

recognized that even detention that is proper at its inception may become constitutionally impermissible as time passes. In ***Salerno***, the Court left open the question of when the duration of otherwise permissible pretrial detention violates due process. 481 U.S. at 747 n.4. Likewise, in ***Carlson v. Landon***, 342 U.S. 524, 546 (1952), the Court reserved the issue of when unusual delay warrants habeas relief from otherwise permissible detention.

More particularly, this Court also recognized that continued detention is improper when the governmental interest becomes attenuated. In ***Jackson v. Indiana***, 406 U.S. 715, 738 (1972), the Court held that a person committed to a psychiatric facility on account of lack of capacity to stand trial may be detained only for "the reasonable period of time necessary to determine whether there is a substantial probability that he will attain capacity in the foreseeable future." If not, he must be accorded a civil commitment proceeding or be released.

Similarly here, while detention may have been proper at its inception to prevent flight, once it becomes evident that departure is not reasonably foreseeable, continued incarceration no longer serves that end. Indefinite incarceration to assure that a person is available for deportation is grossly excessive when there is no substantial probability that deportation will occur.

In sum, the restriction on Mr. Zadvydas's liberty is severe. He was confined to his cell 20 hours a day and allowed only two hours of exercise per week. (J.A. 41). His detention was lengthy – four years – and without the procedural protections present in ***Hendricks*** or ***Salerno***.

On the other side of the substantive due process equation, detention is not incident to removal and therefore, as in ***Jackson***, no longer serves its intended purpose. *See infra* Section I. C. Rather, it is based on the INS' prediction of future dangerousness alone, and therefore violates substantive due process. To the extent that 8 U.S.C. § 1231(a)(6) might authorize continued detention under such circumstances, it is unconstitutional as applied to Mr. Zadvydas.

C. Mr. Zadvydas's Deportation is Not Reasonably Foreseeable; Therefore Continued Detention is Excessive to the Governmental Interest and Violates Due Process.

All evidence indicates that Mr. Zadvydas's 1994 deportation order is unlikely to be effectuated in the foreseeable future. As classified on his 1956 visa, Mr. Zadvydas is "stateless." (J.A. 4). His only potential host countries, Lithuania and Germany, have refused him entry. The INS's consistent inability to find a host country is in no way the fault of Mr. Zadvydas. Mr. Zadvydas has cooperated with the government's efforts to deport him. He has had no objection to being deported to any of the potential host countries. (J.A. 46) He and his family have provided the INS with all available documentation. Nevertheless, he has no realistic prospects for obtaining travel documents.

The Federal Republic of Germany refused Mr. Zadvydas admission in 1995. Responding to an INS inquiry, the German Vice Consul in Houston, Texas, required proof of German citizenship. The INS was unable to

provide proof of citizenship. Accordingly, the Vice Consul advised that Zadvydas did not hold German citizenship and hence could not obtain a German passport. (J.A. 31 & 33)

Lithuania also has refused Mr. Zadvydas admission. Its refusal is based upon inadequate proof that his parents were born in Lithuania before 1940. The INS provided Lithuanian authorities with all available documentation by May of 1997. Lithuanian authorities were not satisfied and demanded additional proof. No such proof exists. Since then, the INS continues to direct Mr. Zadvydas to reapply with the same documents previously rejected. Mr. Zadvydas repeatedly complies and the Lithuanian General Consulate repeatedly refuses, noting the insufficiency. (J.A. 23, 61-62, 96, 106, 164, 168-172).

Nonetheless, the government continues to point to four documents which it argues may satisfy Lithuanian authorities: (a) the baptismal certificate of Mr. Zadvydas's mother; (b) his father's affidavit stating that he was born on May 14, 1913, in Mazaikiai, Lithuania; (c) a visa application for entry to the United States; and (d) documents recording his parents' marriage in Lithuania, including sworn statements by his parents. All of these documents, however, were presented to the Lithuanian Consulate in early 1997 and rejected in 1998.[7]

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[7] In 1996, the INS also made unsuccessful efforts to obtain travel documents to the Dominican Republic, the country of origin of Mr. Zadvydas's wife. (J.A. 64). Dominican authorities did not respond to the INS inquiry.

Assuming arguendo that Mr. Zadvydas miraculously obtained the documentation required by Lithuania and Germany, he still would not be granted citizenship or admission because of his criminal convictions. Lithuanian law precludes granting of citizenship to "persons who, before coming to Lithuania, have been sentenced in another state to imprisonment for a deliberate crime for which criminal liability is imposed by the laws of the Republic of Lithuania. . . . " Ruta M. Kalvaitis, *Citizenship and National Identity in the Baltics*, 16 Boston Univ. Int'l Law J. 231, 266-67 (1998). Burglary and robbery, the *malum in se* offenses of which Mr. Zadvydas was convicted, would be crimes in any country. Likewise, Germany has acceded to the Convention on the Reduction of Statelessness (Appendix G, p.A-13), which permits a state to deny citizenship to stateless persons with criminal convictions. *Id.* at 251; Convention on the Reduction of Statelessness, August 30, 1961, 989 U.N.T.S. 175, Art.1, § 2(c).[8] Thus, even if otherwise admissible, Mr. Zadvydas would be denied entry to his only potential host countries on the basis of his criminal history.

The evidence establishes that Mr. Zadvydas cannot be deported because no country will take him. Accordingly, continued detention is no longer incident to deportation. The only remaining rationale for continued detention is future dangerousness, which is insufficient to justify anything more than temporary confinement.

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[8] Germany acceded to the treaty on August 31, 1977. United Nations, Multilateral Treaties Deposited with the Secretary-General, Status as of 31 December, 1996, at 248.

Therefore, Mr. Zadvydas's detention has become excessive to its purpose, and violates his due process right to be free from arbitrary physical restraint. Mr. Zadvydas should be released on bond, subject to supervision.

D. The INS Custody Review Procedures Do Not Cure the Substantive Due Process Violation.

The INS custody review procedures do not cure the violation of Mr. Zadvydas's substantive due process rights. The review procedures do not consider length of detention or likelihood of deportation. 8 C.F.R. § 241.4. Hence, they neglect key factors in the substantive due process balancing test. Instead, they condition release on future dangerousness alone, in violation of ***Foucha*** and ***Hendricks***.

E. Narrower Alternatives to Incarceration Exist to Satisfy INS Concerns About Future Dangerousness and Flight.

Even if this Court concludes that the INS still has an immigration purpose for Mr. Zadvydas's detention, this Court must determine whether Mr. Zadvydas's detention is narrowly tailored to serve that purpose. To the extent that the government continues to possess an interest in preventing recidivism or reducing flight risk, far less restrictive means than detention exist.

For example, 8 U.S.C. § 1231(a)(3) provides that an alien who does not depart within the 90-day removal period may be subject to supervision. Supervision requires the alien meet periodically with an immigration

officer, submit to medical and psychiatric examinations on demand, provide information about his activities, and obey INS restrictions on his activities. If the alien fails to comply with the requirements of supervision, he may be fined up to $1,000 or imprisoned up to one year. 8 U.S.C. § 1253(b). In addition, if the immigration officer suspects criminal activity, he can notify law enforcement. Also available are halfway houses and civil commitment proceedings. Thus, detention violates substantive due process because it is not narrowly tailored to serve the governmental interest.

F. Entry of a Deportation Order Does Not Strip Mr. Zadvydas, a Long-Time Resident, of Full Substantive Due Process Protection.

The Fifth Circuit broke with 100 years of this Court's jurisprudence to strip Mr. Zadvydas, a long-time resident, of the constitutional protections traditionally afforded long-term residents and to relegate him to the status of an entrant. This is wrong.

As this Court noted in ***Leng May Ma v. Barber***, 357 U.S. 185, 187 (1958):

> [O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, *irrespective of its legality*.

(emphasis added). The distinction is grounded on presence within the territorial borders of the United States. ***Johnson v. Eisentrager***, 339 U.S. 763, 771 (1950). Excludable aliens are deemed to be outside; resident aliens are

inside. Since the end of the nineteenth century, this Court has extended the protection of the Fifth and Fourteenth Amendment to all persons within the territorial jurisdiction of the United States, regardless of citizenship. ***Wong Wing v. United States***, 163 U.S. 228, 238 (1896); ***Yick Wo***, 118 U.S. at 368. Additional justification lies in the ties that residents, unlike entrants, form in this country as they integrate into our social fabric. *See* ***Johnson***, 339 U.S. at 770-71; ***Landon v. Plasencia***, 459 U.S. 21, 32 (1982); ***Kwong Hai Chew v. Colding***, 344 U.S. 590, 596, n.5 (1953). By contrast, aliens who have never entered the country have less constitutional protection.

As a long-time resident, Mr. Zadvydas is entitled to the constitutional protections accorded individuals within the borders of the United States. Forty-four years ago, he was admitted to the United States as a permanent lawful resident. Since he was eight years old, he has lived here continuously with his parents. His father has since died, but his mother lives here now, as do his wife, his daughter and his brothers and sisters.

The Fifth Circuit held otherwise by creating a new rule. Without any authority, it proclaimed that the deportation order stripped Mr. Zadvydas of his status as a long-time resident.

The circuit court attempted to justify its decision by analogy to its earlier decision in ***Gisbert v. U.S. Attorney General***, 988 F.2d 1437, *as amended*, 997 F.2d 1122 (5th Cir. 1993), and the case on which ***Gisbert*** relied, ***Shaughnessy v. United States ex rel Mezei***, 345 U.S. 206 (1953). Neither ***Gisbert*** nor ***Mezei*** apply.

To begin with, ***Mezei*** was a Cold War case involving an alien stopped at the border after a 19-month sojourn in Eastern Europe. Decided at a time when civil liberties fell victim to Cold War tensions, ***Mezei*** rested on national security concerns which are not present in Mr. Zadvydas's case. Further, ***Mezei*** was decided before this Court developed its substantive due process jurisprudence as to regulatory detention in cases like ***Foucha***, ***Hendricks***, and ***Salerno***.

Nor does ***Gisbert*** provide support. Gisbert was an entrant; Mr. Zadvydas was a long-time resident. Under the "entry fiction," Gisbert was paroled into this country pending a decision on admissibility. In contrast, application of the entry fiction to Mr. Zadvydas would be wholly inappropriate as he has lived here 44 years without leaving and seeking reentry.

The issuance of the deportation order cannot support the weight that the circuit court assigns it. This Court has never conditioned presence within the United States for purposes of constitutional protection on the legality of an alien's presence. To the contrary, this Court has made clear that the Fifth and Fourteenth Amendment protections are triggered by either lawful or unlawful presence. ***Plyler v. Doe***, 457 U.S. 202, 210 (1982); ***Leng May Ma v. Barber***, 357 U.S. at 187; ***Kaoru Yamataya v. Fisher***, 189 U.S. 86, 101 (1903).

Moreover on at least two occasions, this Court has afforded constitutional protection to residents *even after* the entry of a deportation order. In ***Wong Wing v. United States***, 163 U.S. 227 (1896), the Court invalidated a federal statute imposing a term of imprisonment on resident

aliens *after* the resident had been "convicted and adjudged to be not lawfully entitled to be or remain at the United States." *Id.* at 233-34. The Court relied on the deportees' due process rights to strike the incarceration provision. Further, in ***United States v. Witkovich***, 353 U.S. 194 (1957), the Court narrowly interpreted statutory restrictions on persons awaiting deportation to avoid constitutional problems. Although these persons already had been ordered deported, the Court found that the restrictions might violate their constitutional rights. In both cases, the deportee retained constitutional protection after issuance of a deportation order.

Contrary to the Fifth Circuit's conclusory assertion, the national interest in excluding an alien who has never entered the country is significantly different than the national interest in expelling a resident, particularly a long-time resident, who is being deported because of criminal activity. The former involves foreign relations and border control. The latter is an issue of crime control, not of national sovereignty.

The distinction is best illustrated by a comparison with ***Gisbert***. ***Gisbert*** concerned a specific problem with Cuba. Cuba initiated the Mariel boatlift in 1980, sending to our shores thousands of its nationals. When another country deposits thousands of aliens on our shores, the governmental interest in effecting their expulsion calls into question United States sovereignty and raises foreign policy concerns. Because sovereignty and foreign policy were at issue in ***Gisbert***, the plenary authority of Congress was implicated.

In contrast, this case concerns only a single deportable alien whom the United States admitted 44 years ago. He cannot be deported because his purported country of origin will not accept him and no other nation will grant him entry. Whether Mr. Zadvydas is released does not affect national sovereignty or foreign relations between our country and Lithuania.

In sum, the simple entry of a deportation order cannot erase 44 years of continuous residency in this country. Consequently, Mr. Zadvydas is entitled to the full constitutional rights afforded other residents. Six years have elapsed since the entry of the deportation order. No country will accept Mr. Zadvydas. Hence, there is no need for his continued detention. But without relief from this Court, he will languish in jail forever.

II. THE LANGUAGE OF 8 U.S.C. § 1231(a)(6), WHEN VIEWED IN LIGHT OF ITS STATUTORY EVOLUTION, COMPELS THE CONCLUSION THAT CONGRESS INTENDED TO AUTHORIZE DETENTION FOR ONLY A REASONABLE TIME IN ORDER TO EFFECTUATE DEPORTATION.

This Court may avoid answering the substantial constitutional question raised by reading into § 1231(a)(6) a reasonable time limitation on the government's authority to detain deportable aliens after final orders. The statute provides:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community

> or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(6).

The statute is silent as to a specific time period for detention after the ninety (90) day removal period. Rather than giving the statute an interpretation that raises substantial constitutional questions, this Court should avoid a substantial constitutional problem by interpreting the statute as permitting detention for only a reasonable period in order to effectuate deportation. The constitutional avoidance doctrine requires courts to construe a statute so as "to avoid such problems unless such construction is plainly contrary to the intent of Congress." ***Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council***, 485 U.S. 568, 575 (1988).[9]

This Court has long held that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter." ***United States ex rel. Attorney General v. Delaware & Hudson Co.***, 213 U.S. 366, 418 (1909) (citation omitted). Thus, " '[a] statute must be construed, if fairly possible, so as to avoid not only the

[9] In discussing ***DeBartolo*** in light of ***Rust v. Sullivan***, 500 U.S. 173 (1991), the court in ***Williams v. Babbitt***, 115 F.3d 657, 662 (9th Cir. 1997), concluded that if "Congress intended an agency [to interpret an ambiguous statute so as to encroach on constitutional boundaries] . . . [Congress] must do so explicitly." It rejected the agency's interpretation of the statute and adopted an alternative reasonable interpretation.

conclusion that it is unconstitutional, but also grave doubts upon that score.' " ***United States v. LaFranca***, 282 U.S. 568, 574 (1931), quoting ***United States v. Jin Fuey Moy***, 241 U.S. 394, 401 (1916) (Other citations of authority omitted). As noted, courts have a duty to "first ascertain whether a construction of the statute is . . . possible by which the [constitutional] question may be avoided." ***United States v. Witkovich***, 353 U.S. 194, 202 (1956) (quoting, ***Crowell v. Benson***, 285 U.S. 22, 62 (1932)).

A. Construing § 1231(a)(6) as Providing a Reasonable Time Limitation on Government's Authority to Detain Aliens Comports with the Canon of Statutory Construction Requiring Courts to Choose a Plausible Construction Avoiding Serious Constitutional Problems.

Rules of statutory construction caution against reading implied authority into a statute when congressional intent is not clear. Congress' non-action affords little foundation for drawing inferences. To read § 1231(a)(6) as authorizing indefinite detention violates this principle of statutory construction. ***United States v. Price***, 361 U.S. 304, 310-311 (1960).

Under the present statute, the Attorney General is required to expel an alien ordered removed within a 90-day "Removal Period." During the removal period, the Attorney General "shall detain the alien," and "[u]nder no circumstances during the removal period shall the Attorney General release an alien" who is removable on the basis of prior criminal convictions or terrorist activity. 8 U.S.C. § 1231(a)(2). Following the removal period, if the Attorney General is not able to effectuate the alien's

removal, detention is governed by two provisions. § 1231(a)(6) provides that "[a]n alien ordered removed [on criminal grounds] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, *may be detained* beyond the removal period . . . " (emphasis added). Another provision, § 1231(a)(3), requires INS supervision of any person released after the removal period, including requirements that the alien periodically appear before an immigration officer, submit to necessary medical and psychiatric exams, give certain information under oath, and obey reasonable restrictions on conduct or activities.

Neither of these sections authorizes indefinite detention of an alien the government is unable to remove. Indeed, if the statute were read to authorize such detention, it would raise serious constitutional questions. Rather than reaching the substantial constitutional issues in this case, the Court should find that Mr. Zadvydas's indefinite detention violates the Act because the Act does not authorize indefinite detention. Wherever possible, courts should construe statutes so as to avoid unconstitutionality. *See* ***Ohio v. Akron Center for Reproductive Health***, 497 U.S. 502, 514 (1990).

B. The Statute's Evolution Demonstrates That Congress Did Not Authorize Indefinite Detention.

That Congress did not authorize indefinite detention is in accord with the statute's history. § 1231(a)(6) differs from its predecessors in two critical respects. First, when

amending the INA, Congress shortened the time in which the INS is required to effectuate an order of removal from six months to 90 days.[10]

Even more significantly, § 1231(a)(6) lacks the mandatory detention language of its predecessors. Both 8 U.S.C. § 1252(a)(2) (1994) (Appendix C, p.A-5) and the Transitional Period Custody Rules (TPCR) (Appendix E, p.A-9) *prohibited* the INS from releasing those unable to demonstrate that they neither posed a danger nor flight risk.[11] In contrast, § 1231(a)(6), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 309-546 (IIRIRA), *merely authorizes* continued detention for an unspecified period of time.

Significantly, in finding that the prior statutory scheme authorized indefinite detention, the district court expressly relied upon both the "mandatory language" of

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[10] *Compare* former 8 U.S.C. § 1252(a)(2)(C) (1952) (Appendix B,p.A-3) ("the Attorney General shall have a period of six months from the date of such order") *with* the present statute ("the Attorney General shall remove the alien from the United States within a period of 90 days").

[11] *See* 8 U.S.C. § 1252(a)(2)(B) (Appendix D, p.A-8) ("The Attorney General may not release from custody. . . . either before or after a finding of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings."); TPCR, IIRIRA § 303(b)(3)(B) ("The Attorney General may release the alien only if the alien . . . satisfies the Attorney General that the alien will not pose a danger to the safety of persons or of property and is likely to appear for any scheduled proceeding.").

8 U.S.C. § 1252(a)(2) and "the absence of a time limit on detention." ***Zadvydas v. Caplinger***, 986 F. Supp. 1011, 1025 (E.D. La. 1997). With such mandatory language now repealed, the Attorney General's statutory authority to indefinitely detain immigrants has been restricted.

C. Courts Have Historically Read a "Reasonable Time" Limitation into Government's Authority to Detain Deportable Aliens Pending Deportation.

Moreover, the "absence of a time limit on detention" has never been viewed as authority for the INS to indefinitely detain. For instance, from 1917 to 1950, the immigration statute did not contain any specific time limit for detention pending deportation. Immigration Act of 1917, §§ 20, 21, 39 Stat. 890-891 (1917) (Appendix A, p.A-1). Nonetheless, the federal courts consistently read a "reasonable time" limitation into the government's authority to detain a deportable alien pursuant to this statute. That period is generally interpreted to be no longer than four months. *See* ***Wolck v. Weedin***, 58 F.2d 928, 931 (9th Cir. 1932); ***Saksagansky v. Weedin***, 53 F.2d 13, 16 (9th Cir. 1931); ***Caranica v. Nagle***, 28 F.2d 955, 957 (9th Cir. 1928); ***Petition of Brooks***, 5 F.2d 238 (D. Mass. 1925); ***United States ex rel. Ross v. Wallis***, 279 F. 401, 404 (2d Cir. 1922).

Not until 1950 did Congress enact a statute which placed a six-month limit on detention following a deportation order. Congress viewed this amendment as a grant of new power.[12] Such a view of this provision is

[12] *See* H.R. Rep. No 1192, 81st Cong., 1st Sess. 6 (1949) ("Existing law does not grant the Attorney General any specified period of time within which he may hold deportable aliens in custody or under control while he negotiates for their return abroad."). Nonetheless, this detention provision still permitted only six months of detention following a final order of deportation. Following the end of the six-month period, "the alien shall become subject to such further supervision and detention pending eventual deportation *as is authorized in this section*," 8 U.S.C. § 1252(c) (repealed 1996) (emphasis added). Section 1252, however, did not authorize any further detention beyond the reasonable deportation period. Thus, even if an alien committed a "laundry list of . . . misdeeds," courts held that "the six month limit on detention . . . was absolute and any detention beyond that time was unlawful." ***Oguachuba v. INS***, 706 F.2d 93, 96 (2d Cir. 1983) (summarizing district court ruling); *see* ***Johns v. Department of Justice***, 653 F.2d 884, 890 (5th Cir. 1981) (finding that after the six month period expires "detention is not permitted"); ***Castillo-Gradis v. Turnage***, 752 F. Supp. 937, 941 (S.D. Cal. 1990) ("Once the six months has expired, the alien must be released and put under supervision until the INS is ready to execute his deportation.").

consistent with the grant to the Attorney General of *more* time to effectuate the deportation than had previously been authorized under the cases cited above. This six-month limit on detention after issuance of a deportation order remained in effect until 1990. In that year, Congress barred release of aggravated felons with final orders of deportation. Section 504, Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).[13] The

[13] Specifically, this amendment stated that "[n]otwithstanding . . . subsections (c) [the six-month rule]" the Attorney General could not release a lawfully admitted alien who had been convicted of an aggravated felony unless the alien could demonstrate a lack of danger and flight risk. INA § 242(a)(2)(A) & (B), 8 U.S.C. § 1252(a)(2)(A) & (B) (repealed 1996). The following year, Congress further amended § 242(a)(2)(B) to make more explicit that the limitation upon release from detention applied to aggravated felons "either

Antiterrorism and Effective Death Penalty Act of 1996 made minor changes to the wording of old INA § 242(a)(2)(A). More significantly, it repealed INA § 242(a)(2)(B), which had permitted the Attorney General to release an aggravated felon from detention upon a showing that the alien was not a danger or flight risk. Section 440(c), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). Thus, for a short period of time, the INS actually had no discretion to release an aggravated felon from detention, either before or after a final order.

Soon thereafter, Congress significantly amended the detention provisions of the INA by passing IIRIRA. This law repealed the detention provisions of INA § 242(a) and created new detention provisions concerning aliens with final orders of removal at INA § 241(a), 8 U.S.C. § 1231(a)(6).

In sum, the present statute differs in two significant respects from its predecessor statutes. (1) It shortens the removal period from six months to 90 days and, (2) it eliminates the language mandating detention of criminal aliens whose release could not be effectuated within this time period. The statutory evolution evidences the congressional intent to restrict the prolonged indefinite detention of immigrants after removal proceedings. The fact that § 1231(a)(6)'s language is far more permissive than that of its statutory predecessors strongly suggests

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before or after a determination of deportability." Section 306(a)(4), Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (Dec. 12, 1991).

the ***Ma*** court correctly interpreted this statute authorizing only a reasonable period of time to effectuate removal.

Because the government detained Mr. Zadvydas for four years after entry of his final deportation order, this delay went beyond a reasonable period within which to effectuate removal; and, therefore, it will no longer be permissible under § 1231(a)(6) as properly construed.

CONCLUSION

For the foregoing reasons, petitioner Kestutis Zadvydas respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fifth Circuit, reinstate the grant of a writ of habeas corpus by the District Court, and order him released from detention.

Respectfully submitted,

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APPENDIX A

1917 ACT

Sect 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the Untied States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime of moral turpitude, committed at anytime after entry; any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes

gather, or who in any way assists any prostitute or protects or promises to protect from arrest any prostitute; any alien who shall import or attempt to import any person for the purpose of prostitution or for any other immoral purpose; any alien who, after being excluded and deported or arrested and deported as a prostitute or a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to and enter the United States; any alien convicted and imprisoned for a violation of any of the provisions of section four hereof; any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude, at any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by Immigration officials, or who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.

APPENDIX B

1952 statute

Former Section 242(c), 8 U.S.C. § 1252(c), 66 Stat. 208 (1952) reads, in pertinent part:

See. 242(c) [8 U.S.C. 1252 (1952)]

> When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detain released on bond in an amount and containing such conditions as the Attorney General may prescribe or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending

eventual deportation as is authorized in this section . . .

APPENDIX C

1990 Amendments

Former Section 242 (formerly codified at 8 U.S.C. § 1252 (1991)) as amended by the Immigration Act of 1990 § 504, Pub. L. No. 101-649, 104 Stat. 4978, reads in relevant part:

Sec. 242 [8 U.S.C. 1232 (1991)]

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congress committees

(1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. . . .

* * *

(2)(A) The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) of this section but subject to subparagraph (B) of this section, the Attorney General shall not release such felon from custody.

(B) The Attorney General shall release from custody an alien who is lawfully admitted for permanent residence on bond or such other conditions as the Attorney General may prescribe if the Attorney General determines that the alien is not a threat

to the community and that the alien is likely to appear before any scheduled hearings.

* * *

(c) Final order of deportation; place of detention

When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall

become subject to such further supervision and detention pending eventual deportation as is authorized in this section.

APPENDIX D

Title 8, United States Code, Section 1252(a)(2)

1991 Version

(B) The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

APPENDIX E

The Transition Period Custody Rules (TCPR) are not codified. The text of the TPCRs can be found in the historical notes following 8 U. S.C.A. § 1226 (Supp.1998). They read, in pertinent part:

(3) Transition period custody rules. –

(A) In general. –

During the period in which this paragraph is in effect pursuant to paragraph (2), the Attorney General shall take into custody any alien who –

(i) has been convicted of an aggravated felony (as defined under section 101(a)(43) of the Immigration and Nationality Act, as amended by section 321 of this division [section 1101(a)(43) of this title]),

(ii) is inadmissible by reason of having committed any offense covered in section 212(a)(2) of such Act [section 1182(a)(2) of this title],

(iii) is deportable by reason of having committed any offense covered in section 241(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of such Act [section 1251(a)(2)(A)(ii), (iii), (B), (C) or (D) of this title] (before redesignation under this subtitle) [redesignating such section as section 237, which is classified to section 1227 of this title], or

(iv) is inadmissible under section 212(a)(3)(B) of such Act [section 1182(a)(3)(B) of this title] or deportable under section 241(a)(4)(B) of such Act (before redesignation under this subtitle) [section 1251(a)(4)(B) of this title],

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(B) Release. –

The Attorney General may release the alien only if the alien is an alien described in subparagraph (A) (ii) or (A) (iii) and –

(i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding, or

(ii) the alien was not lawfully admitted to the United States, cannot be removed because the designated country of removal will not accept the alien, and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of

property and is likely to appear for any scheduled proceeding.

APPENDIX F

8 U.S.C.A. § 1231.

(a)(6) Inadmissible or criminal aliens

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

APPENDIX G

Convention on the Reduction of Statelessness

Article 1, in pertinent part:

2. A Contracting State may make the grant of its nationality in accordance with subparagraph (b) – of paragraph I of this article subject to one or more of the following conditions:

   (c) That the person concerned has neither been convicted of an offence against national security nor has been sentenced to imprisonment for a term of five years or more on a criminal charge;

Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 176.

APPENDIX H

§241.4 Continued detention beyond the removal period.

(a) Continuation of custody for inadmissible or criminal aliens. The district director may continue in custody any alien inadmissible under section 212(a) of the Act or removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:

(1) The nature and seriousness of the alien's criminal convictions;

(2) Other criminal history;

(3) Sentence(s) imposed and time actually served;

(4) History of failures to appear for court (defaults);

(5) Probation history;

(6) Disciplinary problems while incarcerated;

(7) Evidence of rehabilitative effort or recidivism;

(8) Equities in the United States; and

(9) Prior immigration violations and history.

8 C. F. R. § 241.4 (a) (1-1-00 ed.)

APPENDIX I

8 U.S.C.A. § 1231, in pertinent part:

(a)(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(a)(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien –

(b) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(3) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(4) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

8 U.S.C.A. § 1231 (2000).

APPENDIX J

§ 1253. Penalties related to removal

(b) Willful failure to comply with terms of release under supervision. An alien who shall willfully fail to comply with regulations or requirements issued pursuant to section 241(a)(3) [8 USCS §§ 1231 (a) (3)] or knowingly give false information in response to an inquiry under such section shall be fined not more than $ 1,000 or imprisoned for not more than one year, or both.

8 U.S.C.A. § 1253 (2000).

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In the Supreme Court of the United States

KESTUTIS ZADVYDAS, PETITIONER

v.

LYNNE UNDERDOWN AND IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the Immigration and Naturalization Service's continued detention of an alien who is subject to a final order of deportation, but whose removal cannot be effectuated immediately, violates substantive due process, where the alien's custody is reviewed automatically by the Immigration and Naturalization Service on a periodic basis to determine whether he would present a danger to society or a flight risk if released.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (J.A. 192-228) is reported at 185 F.3d. 279. The opinion of the district court (J.A. 111-147) is reported at 986 F. Supp. 1011. The report and recommendation of the magistrate judge (J.A. 70-93) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1999. A petition for rehearing was denied on October 13, 1999 (J.A. 229). The petition for a writ of certiorari was filed on January 11, 2000, and was granted on October 10, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

2. Section 1231(a) of Title 8 of the United States Code is set forth in relevant part at App., *infra*, 4a-6a.

3. The regulations of the Immigration and Naturalization Service (INS) that governed the detention of aliens beyond the 90-day removal period prior to December 21, 2000 (8 C.F.R. 241.4) are set forth at App., *infra*, 7a-8a. The regulations of the INS that govern such detention as of December 21, 2000, are set forth at App., *infra*, 9a-26a.

4. The February 3, 1999, memorandum from the Executive Associate Commissioner of the Immigration and Naturalization Service (INS) to INS Regional Directors, entitled "Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable," is set forth at App., *infra*, 27a-31a. The August 6, 1999, memorandum from the Executive Associate Commissioner of the INS to INS Regional Directors entitled "Interim Changes and Instructions for Conduct of Post-order Custody Reviews," is set forth at App., *infra*, 32a-39a.

STATEMENT

1. a. Petitioner was born in a displaced persons camp in Germany in 1948. His parents were both from Lithuania. In 1956, petitioner immigrated with his family to the United States and became a resident alien. Despite his long residence in the United States, petitioner never became a citizen of this country. J.A. 193, 212-213.

On December 8, 1966, petitioner was convicted of attempted robbery, third degree, in New York state court. J.A. 112. Petitioner was sentenced to six years' imprisonment and served five years of that sentence. J.A. 13. On August 31, 1973, petitioner was arrested on auto theft charges and ultimately was convicted on the basis of a guilty plea. J.A. 13. In 1974, petitioner was convicted on charges of attempted burglary, third degree, in New York state court. J.A. 112. He was sentenced to one and one half to three years' imprisonment. J.A. 13. Petitioner "admitted that he had failed to appear three times on the burglary charge in the 1970's." J.A. 7. During his eventual imprisonment on the burglary charge, petitioner was punished for escape based on his violation of the terms of a furlough or work release program by returning several days late. J.A. 13.[1]

b. On July 6, 1977, the Immigration and Naturalization Service (INS) issued petitioner an order to show cause why he should not be deported. J.A. 112. The INS charged petitioner with being deportable under 8 U.S.C. 1251(a)(4) (1976), as an alien who had been convicted of two crimes involving moral turpitude. J.A. 71 & n.1. Petitioner applied for discretionary relief from deportation under 8 U.S.C. 1182(c) (1976). J.A. 71-72.

On July 13, 1977, the INS granted petitioner release on his own recognizance pending disposition of his deportation charges. J.A. 71. According to the conditions of his release, petitioner was required to obtain the INS's permission before changing his place of residence, to report any change of address or employment, and to report to the INS office in New York on August 31, 1977. J.A. 14-15.

The immigration judge (IJ) before whom the deportation charges were pending subsequently remanded petitioner's case to the INS for adjudication of his application for relief under 8 U.S.C. 1182(c) (1976). J.A. 15. That application was ultimately denied by the INS on February 10, 1982. J.A. 15. In July 1982, the INS notified petitioner that his deportation

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[1] Petitioner's early criminal history also reflects a juvenile record and a charge of car theft in 1964. J.A. 7.

hearing was rescheduled for August 25, 1982. J.A. 112. "Facing a hearing before an immigration judge that year, [petitioner] disappeared," J.A. 193, and failed to appear for his deportation hearing, J.A. 112.

c. The INS's attempts to locate petitioner were unsuccessful. He was not heard from again until he was arrested ten years later, in 1992, in Texas, on drug charges for which he had been initially arrested in Virginia in 1987. J.A. 112. "While on bail awaiting trial in Virginia, [petitioner had] fled to Houston, Texas," to avoid the drug charges. J.A. 14, 193. Petitioner "was in hiding from 1987 until he surrendered himself to the [Texas] authorities in 1992." J.A. 7.

On August 17, 1992, petitioner was convicted in Virginia state court of possession of 474 grams of cocaine with intent to distribute it. J.A. 112, 193. He was sentenced to sixteen years' imprisonment, with six years of that sentence suspended. Petitioner served two years' imprisonment on that sentence and was then released on parole in January 1994 to the custody of the INS. J.A. 113, 193-194.

2. a. On January 24, 1994, the INS issued petitioner a superseding order to show cause, charging him with being deportable under 8 U.S.C. 1251(a)(2)(A)(ii) (Supp. V 1993), as an alien convicted of two crimes involving moral turpitude; under 8 U.S.C. 1251(a)(2)(B)(i) (Supp. V 1993), as an alien convicted of a controlled substance offense; and under 8 U.S.C. 1251(a)(2)(A)(iii) (Supp. V 1993), as an alien convicted of an aggravated felony. J.A. 25, 72.

The INS detained petitioner under 8 U.S.C. 1252(a)(2) (Supp. V 1993) pending completion of the deportation proceedings. J.A. 5. Petitioner requested redetermination of his custody status, and a bond hearing was held by an IJ on February 28, 1994. J.A. 5. The IJ declined to order that petitioner be released. J.A. 5-8. The IJ noted that, in order to obtain release under 8 U.S.C. 1252(a)(2)(B) (Supp. V 1993) during the pendency of deportation proceedings, petitioner bore the burden of establishing that he was lawfully admitted, not a threat to the community, and likely to appear at any scheduled hearings. J.A. 6. The IJ found it unnecessary to decide whether petitioner would pose a threat to the community if released because petitioner's five-year flight from prosecution and other information brought out on cross-examination, including an arrest by the FBI for flight to avoid prosecution, "cast[] serious doubt on [petitioner's] likelihood to appear at future hearings." J.A. 8. On April 8, 1994, the Board of Immigration Appeals dismissed petitioner's appeal from that decision. J.A. 9.

b. Meanwhile, petitioner's deportation proceedings continued on the merits. At a hearing before an IJ on March 29, 1994, petitioner admitted all of the allegations in the order to show cause and was found deportable as charged. J.A. 87-88. Petitioner then applied for relief from deportation under 8 U.S.C. 1182(c) (Supp. V 1993). After a hearing on that application, the IJ issued a decision on May 2, 1994, denying petitioner relief from deportation. J.A. 10-20.

The IJ first recognized as a favorable factor petitioner's "family ties in the United States in the form of his mother, five siblings, a wife, and a daughter," although the IJ noted that no family members had testified or provided affidavits in support of petitioner, thus leading the IJ to question the strength of petitioner's relationship with his family. J.A. 18. The IJ also noted that separating petitioner from his daughter "would not be a unique situation for her" in light of their previous separation due to petitioner's criminal offenses and incarceration. J.A. 18. The IJ identified as additional favorable factors petitioner's residency in this country for over 37 years and the fact that deportation to his native country of Germany would cause petitioner hardship because he does not have family ties to Germany and does not speak the language. J.A. 18-19.

The IJ determined, however, that petitioner's favorable equities were outweighed by "extremely serious negative factors such as [petitioner's] criminal history which extends

over a period of almost 28 years and includes burglaries, thefts, and armed robberies, his abuse of drugs, his distribution of drugs, his flights to avoid prosecution and prison, and his questionable rehabilitation," J.A. 20, the latter as evidenced by his minimization of his participation in the drug-trafficking scheme, J.A. 19. Indeed, the IJ observed, "[f]or most of the last 27 years, [petitioner] has been either engaged in criminal activity, in prison, or a fugitive." J.A. 18. He "absconded during the pendency of deportation proceedings," "abused the privilege of a supervised release from prison in 1976, fled to avoid prosecution in 1987, and was a fugitive from justice from 1987 until 1992." J.A. 19. The IJ therefore concluded that a favorable exercise of discretion was not warranted in this case. J.A. 20.[2]

At the time of the deportation hearing, it was believed that petitioner was a citizen of Germany. J.A. 10; see also Sept. 27, 1996 Tr. 42 (petitioner testified that he thought that he was a German citizen until he and the INS learned otherwise). The IJ therefore ordered that petitioner be deported to Germany. J.A. 20. Petitioner did not appeal that decision, and it thereby became a final order of deportation. J.A. 194.[3]

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[2] Because petitioner entered the United States before 1972, the IJ also considered whether petitioner qualified for registry under 8 U.S.C. 1259 (1988 & Supp. V 1993). Under that statutory provision, the Attorney General may provide, in her discretion, a "record of lawful admission for permanent residence," known as "registry" (see *Mrvica* v. *Esperdy*, 376 U.S. 560 (1964)), to an alien who entered the United States prior to 1972 if the alien meets certain statutory criteria, including that he has resided in the United States continuously since entry, is a person of good moral character, is not ineligible for citizenship, and is not inadmissible on certain grounds. The IJ determined that petitioner could not meet the statutory requirement of good moral character under the registry provision because of his conviction of an aggravated felony. J.A. 11-12.

[3] On January 9, 1995, petitioner filed a motion to reopen his deportation proceedings to apply once again for relief under Section 1182(c). J.A. 26. On January 19, 1995, an IJ denied the motion because it

3. In May 1994, an INS official began the process for obtaining travel documents from Germany so that the INS could effectuate petitioner's deportation. J.A. 113. After the INS submitted the necessary application to the German Consulate, the Consulate informed the INS on June 28, 1994, that it had determined that petitioner's parents were Lithuanian and that petitioner is not a German citizen. J.A. 74, 113.[4]

On July 26, 1994, the INS sent a formal written request to the Lithuanian Consulate for a travel document for petitioner based on his Lithuanian parentage. J.A. 74. The Lithuanian Consulate responded on August 22, 1994, stating that it declined to issue petitioner a travel document on the ground that he is not a citizen or permanent resident of Lithuania. J.A. 23, 74, 194. On October 3, 1994, INS Headquarters formally requested permission from Lithuania for the return of petitioner to that country. J.A. 74.

In October 1996, the INS again contacted the Lithuanian Consulate to determine whether petitioner could claim Lithuanian citizenship. J.A. 195. The INS was informed that petitioner could apply for citizenship if he could prove that his parents were born in Lithuania before 1940. J.A. 195, 215-216. On April 23, 1997, the INS forwarded another formal request for travel documents to the Consulate of Lithuania. J.A. 96-98. The letter requested information about how a child born of Lithuanian parents in a country other than Lithuania acquires Lithuanian citizenship. J.A. 97. It also enclosed documents reflecting the baptism of peti-

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was not accompanied by an application for relief under Section 1182(c), and because petitioner could not make a prima facie showing of eligibility for that relief. J.A. 26-27.

[4] The INS continued its efforts to obtain travel documents for petitioner from Germany. The German Consulate obtained further information, but ultimately again denied the request in May 1995, stating that it had conducted extensive research and determined that petitioner is not a German citizen. J.A. 75, 194-195.

tioner's mother and the marriage of petitioner's parents in Lithuania. *Ibid.*; see also J.A. 106-107 (letter enclosing clearer copies of same documents and an additional document relating to petitioner's father). The Lithuanian government provided additional information about the type of documentation required following a meeting in September 1998. J.A. 164-165. See also note 22, *infra*.[5]

4. In the meantime, in September 1995, petitioner had commenced the instant action by filing a petition for a writ of habeas corpus under 28 U.S.C. 2241, contending that his continued detention violated the Eighth Amendment, due process, and international law. J.A. 195.

a. The matter was referred to a magistrate judge, who conducted an evidentiary hearing on September 27, 1996. J.A. 70. On February 3, 1997, the magistrate judge issued a report recommending that the petition be denied. J.A. 70-93. The magistrate judge found that petitioner's continued detention under 8 U.S.C. 1252(a)(2)(A) and (B) (1994) was "statutorily authorized and does not constitute an abuse of the Attorney General's broad discretion in immigration matters." J.A. 76-77. The magistrate judge also concluded that petitioner's detention did not violate substantive due process because the purpose of his detention was not punishment, but rather was to further the government's compelling interest in protecting the community and its legitimate interest in preventing aliens from absconding before they are deported, and because petitioner's continued detention was not an excessive means of accomplishing those purposes. J.A. 79-82. The magistrate judge rejected petitioner's contention that because he had been a resident alien, he was entitled to greater protections than the excludable aliens who had been involved in earlier cases upholding the

[5] In addition, the INS submitted an unsuccessful request for travel documents to the Consulate of the Dominican Republic because petitioner's wife is a native of that country. J.A. 64-65, 195.

constitutionality of continued detention. J.A. 82-83. The magistrate judge reasoned that whether detention is punitive turns not on the distinction between resident and excludable aliens, but rather on the governmental purpose underlying the detention. The magistrate judge concluded that the governmental objectives in protecting society and preventing "bond jumping" justify the detention of aliens who at one time had the status of permanent residents. J.A. 83. The magistrate judge also concluded that petitioner was not being arbitrarily imprisoned for an indefinite time in violation of international law or the Eighth Amendment because the INS's efforts to effectuate his deportation were ongoing. J.A. 90-92.[6]

b. On October 30, 1997, the district court issued an order disagreeing with the magistrate judge's recommendation and granting petitioner habeas relief, based on the court's conclusion that petitioner's continued detention violated substantive due process. J.A. 111-147.[7]

[6] The magistrate judge found it unnecessary to determine whether Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276—subsection (c) of which mandated the detention of aliens who are aggravated felons—should be applied retroactively to petitioner's case, because the court had already determined that he was not entitled to relief under the more lenient pre-AEDPA law. J.A. 92; see also J.A. 91 n.8 (indicating that the transition period custody rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (discussed at note 12, *infra*), allowed petitioner to apply for release on bond, but that the INS had determined that petitioner would not be eligible under those rules).

[7] As an initial matter, the court held that it had jurisdiction over the habeas corpus petition notwithstanding 8 U.S.C. 1252(g) (Supp. III 1997), as amended by IIRIRA. J.A. 115-124. The INS did not contest the district court's jurisdiction on appeal, and the court of appeals held that, under the then-recent decision in *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), judicial review of petitioner's detention is not precluded by Section 1252(g). J.A. 198-199. We agree with the court

The district court framed petitioner's substantive due process claim as presenting the question "whether a legal alien who is under a final order of deportation may be permanently incarcerated because the INS cannot find a country to take him." J.A. 136. The court held that such detention is unconstitutional. The court recognized (J.A. 136-140) that petitioner's detention was consistent with the INS's statutory authority under 8 U.S.C. 1252(a)(2)(A) and (B) (1994), because, "[c]onsidering petitioner's recidivist history and his prior episode of 'bond jumping,' petitioner has not met his burden of proving that he is not a threat to the community and that he is likely to appear for scheduled hearings." J.A. 139. The court also noted that Congress nowhere placed a time limit on the detention of aggravated felons, such as petitioner, who cannot meet the statutory standards for release and whose immediate deportation is not possible. J.A. 139-140. And the court recognized that detention of aliens such as petitioner furthers the government's legitimate interests in protecting the community from aggravated felons and preventing aliens from absconding before they are deported, and that those interests "can warrant a deprivation of liberty under the proper circumstances." J.A. 143 (quoting *United States* v. *Salerno*, 481 U.S. 739 (1987)). The court held, however, that petitioner's detention was an excessive means of accomplishing those purposes because of its duration up to that time and what the court believed to be "its potential, if not certainty, for indefinite duration in the future," in light of the INS's lack of success in obtaining travel documents from Lithuania. J.A.

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of appeals that Section 1252(g) does not bar a district court from exercising habeas corpus jurisdiction to consider an alien's challenge to his continued custody following entry of a final order of deportation.

The district court also rejected petitioner's procedural due process claims that challenged various aspects of his deportation hearing. J.A. 126-136. Petitioner did not cross-appeal from those rulings. J.A. 196 n.3.

143. The court therefore ordered that petitioner be released from the INS's custody on conditions to be set by the court after a hearing. J.A. 146-147, 197.[8]

5. The court of appeals reversed. J.A. 192-228. The court reviewed the four statutory regimes that have governed immigration detention since petitioner's placement in INS custody in 1994, in order to determine which regime would currently govern petitioner's detention. The court noted that, "[t]wo of them, the rule in place when [petitioner] was initially detained, see 8 U.S.C. § 1252 (1994), and the Transition Period Custody Rules authorized in IIRIRA (see note 12, *infra*), place the burden on a detainee awaiting deportation to prove that he is not a danger to the community or a flight risk before being released on parole pending deportation." J.A. 199-200. The court noted that under a third regime, enacted in Section 440(c) of AEDPA (see note 6, *supra*), petitioner's detention would be mandatory regardless of the danger or flight risk he posed. J.A. 200. Finally, with regard to the fourth statutory regime, *i.e.*, the permanent provisions of IIRIRA, the court recognized that 8 U.S.C. 1231(a)(6) (Supp. V 1999) "authorizes detention but makes it discretionary beyond an initial ninety day period." J.A. 200 & n.6. The court agreed with the INS that petitioner's detention is governed by Section 1231(a)(6) (J.A. 200-202), emphasizing that "the rapid passage of IIRIRA in the immediate wake of AEDPA seems to indicate that Congress repudiated the harsh mandatory detention regime created by AEDPA for aliens whose deportation is final." J.A. 200-201. The court specifically found that petitioner is subject to detention under Section 1231(a)(6) based on his conviction of an aggravated felony and his conviction of a controlled substance violation. J.A. 202 n.8.

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[8] The district court denied the government's motion to alter or amend the judgment on December 19, 1997, J.A. 150, and petitioner was released by the INS pursuant to the court's judgment in late 1997, J.A. 176.

Turning to the question of the constitutionality of petitioner's continued detention under 8 U.S.C. 1231(a)(6) (Supp. V 1999), the court based its analysis on the assumption that an alien in petitioner's position is entitled to obtain periodic review by the INS of his detention under INS regulations. J.A. 202. The court pointed to the regulations governing review of the custody status of aliens detained under Section 1231(a)(6), which "authorize the release of such aliens when it is determined that the alien 'is not a threat to the community and is likely to comply with the removal order.'" J.A. 203 (citing 8 C.F.R. 236.1(d), 241.4, 241.5). The court further pointed out that those regulations have been "explained and expounded in the February 3, 1999, 'Memorandum for Regional Directors from INS Executive Associate Commissioner Michael A. Pearson concerning 'Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable,'" J.A. 203. That memorandum required the INS to review the custody status of detained aliens every six months to determine whether there has been a change in circumstances that would support release, and to document the alien's file to show reasons for detention decisions; and the governing regulations provided that if an alien requested a custody review in writing, he could appeal the district director's decision to the Board of Immigration Appeals. J.A. 203 & n.9.[9] The court of appeals emphasized that "[t]he district court found that the INS did not err in determining that [petitioner] posed a danger to the community and a flight risk," and that "[s]hould [petitioner] no longer do so, he would doubtless be released." J.A. 204-205.

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[9] See pp. 43-45, *infra* (discussing new regulation replacing this administrative regime with a review process that includes centralized review by INS Headquarters similar to that afforded under the Cuban Review Plan, rather than appeal to the Board of Immigration Appeals).

Against this background, the court of appeals held that the INS constitutionally may continue to detain an alien under a final order of deportation "based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place." J.A. 227. In doing so, the court emphasized that the "power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control," and that "[t]he power of the national government to act in the immigration sphere is thus essentially plenary." J.A. 206, 207 (citations omitted).

The court rejected petitioner's claim that his detention constituted punishment without trial and violated a substantive due process liberty interest. J.A. 208-209. The court explained that, in *Gisbert* v. *United States Attorney General*, 988 F.2d 1437, 1448, amended by 997 F.2d 1122 (5th Cir. 1993), it had held "that excludable aliens may be detained pending deportation without such detention constituting unconstitutional punishment, even when the aliens' country of origin indicates it will not accept their return." J.A. 209 (also citing *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441, 1450 (9th Cir.) (en banc), cert. denied, 516 U.S. 976 (1995) (accord with *Gisbert*)). The court further explained that, drawing on the reasoning of *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), it had found in *Gisbert* that "detention pending deportation does not constitute punishment, since the detention could rationally be seen as a necessary byproduct of the need to expel an unwanted alien rather than a punitive decision." J.A. 210.

The court of appeals rejected petitioner's attempt to distinguish *Gisbert* and *Mezei* on the ground that, unlike the aliens involved in those cases, who were excludable because they were stopped at the border and not allowed to enter this country, petitioner "is a resident alien." J.A. 211. The court acknowledged that petitioner's prior status as a re-

sident alien had entitled him to greater *procedural* due process protections than an excludable alien would have had in the administrative proceedings to determine whether he would be entitled to remain in this country. J.A. 211. But it concluded that different treatment was no longer warranted "when, as here, a final decision to deport the once resident alien has been made and stands unchallenged." J.A. 211; see also J.A. 220. The court opined that even excludable aliens are entitled to certain due process protections and that the lesser protection afforded them in proceedings to determine whether they may enter the country is not based on their excludable status as such, but rather is due to the fact that they are seeking the privilege of entry into this country. J.A. 220.

After reviewing the case law governing the various constitutional protections accorded excludable and inadmissible aliens, the court of appeals concluded that "[n]othing in these cases suggests that a resident alien has a broadly privileged constitutional status relative to excludable aliens, or is constitutionally entitled to more favorable treatment when both the right asserted and the governmental interest are identical to those in the parallel case of an excludable alien." J.A. 223. The court stressed that the constitutional rights of both excludable and deportable aliens may be affected by Congress's power over immigration. J.A. 223 (citing *Fong Yue Ting* v. *United States*, 149 U.S. 698, 711 (1893) (United States' power to terminate residence in this country of resident alien); *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896) (discussing Congress's power to expel aliens who are present in this country)). It follows, the court explained, that when the rights of such aliens come in conflict with the government's sovereign interests, "their rights are constrained accordingly and to the same extent." J.A. 224. The court therefore concluded that "[i]n the circumstances presented here, the national interest in effectuating deportation is identical regardless of whether the alien was once resident

or excludable." J.A. 224. When a permanent resident alien becomes the subject of a final order of deportation, that alien is no longer a permanent resident, and "[t]he need to expel such an alien is identical, from a national sovereignty perspective, to the need to remove an excludable alien who has been finally and properly ordered returned to his country of origin." J.A. 224. That the government cannot immediately effectuate the deportation of a criminal alien does not alter the analysis, the court reasoned, because, regardless of whether the criminal alien is a former resident or was excludable at the outset, the government has an interest in protecting society against the risk that he will commit more crimes if released or will not appear when actual deportation becomes feasible. J.A. 225-227.

The court of appeals rejected the district court's characterization of petitioner's detention as "permanent confinement," explaining that that characterization "considerably overstates the matter." J.A. 211. The court pointed to the INS's regulatory procedures, discussed earlier in its opinion, which provide for automatic, periodic administrative review of petitioner's detention and allow for his release if the INS determines that he no longer poses a threat to the community or a flight risk. J.A. 211-212.

Finally, the court of appeals rejected the district court's conclusion that petitioner "will never be deported." J.A. 212. The court noted that the circumstances surrounding petitioner's deportation are complex and will doubtless require more time than usual, but that it had not been clearly established that there was no meaningful possibility of ever deporting him. J.A. 212. The court recounted the history of the area in modern-day Lithuania in which petitioner's parents were born, J.A. 212-213, and acknowledged that petitioner "may in a sense be stateless," but it concluded that that did not preclude petitioner from claiming or obtaining Lithuanian citizenship based on the birth of his parents in Lithuanian territory, J.A. 214-216. "Certainly," the court

observed, "there has been no definitive denial by Lithuania of any application for citizenship by [petitioner]." J.A. 216. The court also noted two other possibilities that remained unexplored: a claim by petitioner of German citizenship based on ethnic German ancestry through his mother, and a claim of Russian citizenship because of the Soviet Union's prior control over the birthplace of petitioner's parents and the fact that some of petitioner's relatives live there. J.A. 217-219. The court concluded that, "[g]iven the traditional deference we show to the other branches in matters of immigration policy, judicial intrusion should not be considered, particularly where there are reasonable avenues for parole, until there is a more definitive showing that deportation is impossible, not merely problematical, difficult, and distant." J.A. 219.

SUMMARY OF ARGUMENT

The continued detention of an alien by the Immigration and Naturalization Service (INS) under 8 U.S.C. 1231(a)(6) (Supp. V 1999) does not violate substantive due process where the alien is under a final order of deportation but has not yet been removed, and the alien's detention is subject to periodic administrative review to determine whether he would present a risk to the community or of flight if released. Congress's enactment of Section 1231(a)(6) and its predecessor statutes reflects Congress's judgment that the government's interests in preventing danger to the community and ensuring the appearance of aliens at future immigration proceedings justify the Attorney General's continued detention of an alien whose release would present such risks. Section 1231(a)(6), as enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C., 110 Stat. 3009-575, reflects Congress's determination that, when faced with the difficult situation of an alien under a final order of deportation who has no right whatsoever to be in this country but

who cannot be removed within the removal period, the Attorney General must be provided sufficient authority to determine how best to serve those interests and also to be able to release aliens where such release would not undermine those interests.

The Attorney General's detention of an alien, pursuant to the statutory authority granted her by Congress, must be accorded substantial deference under the plenary power doctrine. This Court has recognized that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," and that "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). Moreover, this Court has made clear that, when Congress vests in the Attorney General the discretionary authority over detention decisions regarding aliens subject to deportation, such decisions are subject to only the most deferential standard of judicial review. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953); *Carlson* v. *Landon*, 342 U.S. 524 (1952); *Reno* v. *Flores*, 507 U.S. 292 (1993). Petitioner's claim to heightened due process scrutiny cannot be reconciled with those rulings.

Congress's grant of authority to the Attorney General to detain dangerous aliens such as petitioner is consistent with this Court's substantive due process precedents. The Court upheld the Attorney General's similar exercises of detention authority over aliens in *Mezei* and *Carlson* based on the threat of harm to the community that Congress determined would be posed by the release of such aliens. And the Court has upheld the constitutionality of detention based on future dangerousness in other contexts involving citizens, where the special deference to the political Branches in matters regarding aliens was not even involved. See *Kansas* v.

Hendricks, 521 U.S. 346 (1997); *United States* v. *Salerno*, 481 U.S. 739 (1987). In light of the deference due Congress's judgment in immigration matters, the government's interest in preventing the release into society of an alien who is awaiting removal, and who has been determined by the Attorney General to pose a risk to the community if released, is sufficiently weighty to justify Congress's authorization of detention here.

Petitioner's long-time residency in this country does not mean that his detention following entry of a final order of deportation violates due process. Petitioner's failure to obtain United States citizenship during his 44 years of residency here means that petitioner remains subject to the plenary power of Congress to expel aliens. That does not mean that the Due Process Clause of the Fifth Amendment is altogether inapplicable to petitioner. But it does mean that any due process inquiry must take into account the substantial deference owed the political Branches in determining what process is due, as the court of appeals' analysis in this case did. The court of appeals reasonably held that, for purposes of a due process analysis of immigration detention, petitioner stands essentially on the same footing as an excludable alien who has been ordered removed after seeking to enter the United States. The alien's lack of a right to be present in the United States, and the government's countervailing interests in protecting against danger to the community and effectuating removal, are the same in the two situations. Congress views the United States's interests to be analogous in detaining a former resident alien like petitioner and an excludable alien, because both categories of aliens are subject to detention beyond the removal period under 8 U.S.C. 1231(a)(6) (Supp. V 1999).

Detention of an alien like petitioner under Section 1231(a)(6) is not unconstitutionally indefinite or excessive. Such detention cannot fairly be characterized as indefinite in light of the existence of administrative procedures that

provide for a periodic and meaningful review of petitioner's custody, and the possibility that continued diplomatic efforts with Lithuania, Germany or Russia might result in petitioner's removal. Such detention is not excessive compared to the interests the government seeks to protect. As in *Kansas* v. *Hendricks*, Congress has adequately distinguished the persons who may be detained under Section 1231(a)(6) from other persons whose detention would not be related to a legitimate government interest. The fact that petitioner may currently be stateless does not mean that he cannot be removed to another country, particularly, for example, if he is able to obtain citizenship elsewhere. The courts should be especially reluctant to second-guess Executive Branch judgments regarding the prospects of removing such an alien, both because of the Executive's greater expertise and access to all the relevant information and communications, and because of the need for the Nation to speak with one voice on such matters.

ARGUMENT

THE CONTINUED DETENTION OF AN ALIEN UNDER A FINAL ORDER OF DEPORTATION WHOSE REMOVAL HAS NOT YET BEEN EFFECTUATED COMPORTS WITH DUE PROCESS, WHERE THE DETENTION IS SUBJECT TO PERIODIC REVIEW TO DETERMINE WHETHER THE ALIEN WOULD PRESENT A RISK TO THE COMMUNITY OR OF FLIGHT IF RELEASED

A. The Attorney General's Decision To Detain An Alien Under A Final Deportation Order, Pursuant To Authority Granted By Congress, Must Be Accorded Substantial Deference Under The Constitution

1. This Court has long made clear that the political Branches enjoy broad powers over immigration. *Chae Chan*

Ping v. *United States*, 130 U.S. 581, 606 (1889). Indeed, "over no conceivable subject is the legislative power of Congress more complete." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). The Court has explained that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952).

The authority of the political Branches in immigration matters derives from the "inherent and inalienable right of every sovereign and independent nation" to determine which aliens it will admit or expel. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 711 (1893). "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953).

Contrary to petitioner's contention (Br. 9, 14, 24-25), there is no exception to these fundamental principles for matters concerning the detention of aliens in connection with their removal from the United States. The detention of aliens, like other aspects of immigration, has clear implications for the Nation's sovereignty, security, and foreign policy. Accordingly, the political Branches' plenary power over immigration encompasses the formulation of policies concerning the detention of aliens against whom removal proceedings have been commenced or a final order of removal has been entered. Indeed, "[p]roceedings to exclude or expel [aliens] would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation." *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896).

These concerns may be especially pronounced when the removal of an alien who is no longer entitled to remain in the United States cannot be effectuated immediately because of the refusal by another nation to accept responsibility for its own citizens. See *Mezei*, 345 U.S. at 216 ("Congress may well have felt that other countries ought not shift the onus to us; that an alien in respondent's position is no more ours than theirs."). That is especially so when the Attorney General reasonably determines that such an alien, who has no right to be here, would pose a risk of flight or danger to the community of the United States if released.

Negotiations between the Executive Branch and a foreign country concerning the return of an alien, as well as to establish the logistics for accomplishing the return, can be sensitive and difficult, sometimes for reasons wholly unrelated to the circumstances of any particular alien. That could be true, for example, where the other country's refusal to accept the return of its citizens is part of a broader diplomatic schism between the two nations, or where arrangements for repatriation are tied up with efforts at a more general normalization of relations. In other situations, negotiations with the other country may be especially difficult because of the particular alien involved—where, for example, the alien is a terrorist who the other country might want to remain in the United States precisely because of the risk of harm he presents, or the alien is simply unwelcome because of his criminal background or other characteristics. Critical sovereignty, security, and foreign policy concerns would arise if another country, simply by refusing to accept the return of its own citizens, could force the United States to allow those aliens to be at liberty in the United States, even where they would threaten harm to the community or flee if released. And if a United States court ordered the release of the aliens on the basis of a determination that they are unlikely to be removed in the near future, the effect would be to undermine the position of the United States in

the international community, speaking with one voice through the Executive Branch, that the other nation must promptly accept the return of its citizens who have been ordered deported from the United States. "The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

It is for reasons such as these that the political Branches must have broad latitude in fashioning policies concerning the detention or release of aliens who are ordered removed from the United States, and that courts must give great deference to Congress in enacting laws governing detention and to the Executive in implementing those laws. See *Gisbert* v. *United States Attorney General*, 988 F.2d 1437, 1447 ("The United States cannot be forced to violate its national sovereignty in order to parole [criminal] aliens within its borders merely because [the native country] is dragging its feet in repatriating them."), amended by 997 F.2d 1122 (5th Cir. 1993); *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441, 1448 (9th Cir.) (en banc) ("Reading a time limit on detention [of excludable aliens] would risk frustrating the government's ability to control immigration policy and relations with foreign nations."), cert. denied, 516 U.S. 976 (1995).

2. This Court has expressly upheld the authority of the Attorney General, acting pursuant to congressional authorization, to detain an alien as a means of enforcing the decision that the alien is not entitled to be admitted into the United States. See *Mezei*, 345 U.S. at 210, 215-216. And the Court has upheld, against constitutional challenge, the power of Congress to vest the Attorney General with the discretion to determine whether to release an alien from custody pending deportation proceedings. *Reno* v. *Flores*, 507 U.S. 292, 306 (1993); *Carlson* v. *Landon*, 342 U.S. 524, 538-544 (1952); cf. *United States* v. *Salerno*, 481 U.S. 739, 748 (1987) ("Even

outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons. Thus, we have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings.").

Petitioner's claim (Br. 8, 11-13) that his immigration detention nonetheless necessarily implicates a fundamental liberty interest that requires application of heightened due process scrutiny cannot be reconciled with those rulings. The Court has made clear that when Congress vests in the Attorney General the discretionary authority over the detention of aliens subject to deportation, the Attorney General's decisions are subject to only the most deferential standard of review. *Carlson*, 342 U.S. at 540-541 (noting congressional intent "to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse," and holding that the Attorney General's detention determination can be overridden only "where it is clearly shown that it 'was without a reasonable foundation'"); *Flores*, 507 U.S. at 306 (INS regulation governing detention must meet "the (unexacting) standard of rationally advancing some legitimate governmental purpose"). Petitioner's invocation (Br. 13, 15, 20) of a narrow-tailoring standard is also inconsistent with those decisions. See, *e.g.*, *Flores*, 507 U.S. at 301-302, 305, 306 (quoting narrow-tailoring standard when describing parties' claim, but requiring no more than rationality and a "reasonable fit" between governmental purpose and means chosen to advance that purpose).

For these reasons, the Attorney General's exercise of congressionally delegated authority to detain an alien in petitioner's circumstances should be accorded the utmost deference under this Court's precedents recognizing the plenary power of the political Branches with respect to immigration, which here includes protection of the United States and its citizens and lawful residents against harm that

might be perpetrated against them by aliens who have already been convicted of aggravated felonies. See *Carlson*, 342 U.S. at 534-536, 538, 542; *Aguirre-Aguirre*, 526 U.S. at 425 ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'").

B. Detention Of An Alien Who Has Been Determined To Pose A Risk To The Community Or Be Unlikely To Comply With A Final Deportation Order If Released Furthers Important Governmental Interests And Comports With Due Process

1. *Congress has concluded that detention of a criminal alien under a final deportation order is justified in these circumstances*

Congress has made clear, over the course of the last decade, that in its judgment detention by the Attorney General of a criminal alien under a final order of deportation is justified where the alien poses a risk to the community or is unlikely to appear for further immigration proceedings if released. Preventing danger to the community is undoubtedly a legitimate goal of the government, *Salerno*, 481 U.S. at 747, as is ensuring the appearance of aliens at future immigration proceedings, *id.* at 749. Congress has relied on those two interests in a series of recent amendments to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, which have included risk to the community and risk of flight as grounds for continued detention of a criminal alien under a final order of deportation.

In 1988, Congress enacted a provision directing the Attorney General to take into custody any alien convicted of an aggravated felony upon completion of his criminal sentence, and not to release the aggravated felon from custody. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a), 102 Stat. 4470; 8 U.S.C. 1252(a)(2) (1988). In

1990, Congress amended that provision to clarify that it applied to aliens both before and after they became subject to a final order of deportation. The 1990 amendment also added a statutory exception to the mandatory-detention provision that required the release on bond or other conditions of an aggravated felon who had been lawfully admitted for permanent residence, but only if the Attorney General determined that the alien was not a threat to the community and was likely to appear for any immigration hearings. See Immigration Act of 1990, Pub. L. No. 101-649, § 504(a), 104 Stat. 5049; 8 U.S.C. 1252(a)(2)(A) and (B) (1988 & Supp. II 1990). In 1991, Congress reworded that exception to provide that the Attorney General could not release a lawfully admitted alien who was an aggravated felon unless the alien demonstrated "to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings." Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(4), 105 Stat. 1751; 8 U.S.C. 1252(a)(2)(B) (Supp. III 1991); 8 U.S.C. 1252(a)(2)(B) (1994).[10]

When Congress enacted AEDPA in 1996, it eliminated the provision allowing release of aggravated felons (and certain other criminal aliens) if they satisfied the Attorney General that they would not pose a threat to the community and would be likely to appear for hearings if released. See 8 U.S.C. 1252(a)(2), as amended by AEDPA § 440(c), 110 Stat. 1277. That section of AEDPA was replaced less than six months later, however, by the provisions of IIRIRA that

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[10] That is the version of the statute that was in effect when petitioner initially requested that he be released on bond pending his deportation proceedings (see J.A. 5-8 (March 14, 1994, IJ decision applying that statutory standard)), and when he filed his petition for habeas corpus relief in September 1995 (see J.A. 195). See also J.A. 77 (magistrate judge applying that statutory standard); J.A. 137-140 (district court invoking same statutory provision).

grant the Attorney General discretion to release a criminal alien after expiration of the statutory 90-day removal period,[11] but specify that she may continue certain aliens in custody beyond that date, including any alien "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6) (Supp. V 1999).[12]

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[11] At the time of petitioner's deportation proceedings, the INA referred to aliens who were present in the United States but subject to expulsion as "deportable," and to aliens at the border who were subject to continued exclusion as "excludable." See 8 U.S.C. 1182, 1251 (1994). The administrative proceedings in which those determinations were made were called "deportation" and "exclusion" proceedings, respectively. 8 U.S.C. 1227, 1252 (1994). Section 301 of IIRIRA amended the INA to refer to "excludable" aliens as "inadmissible" aliens (*e.g.*, 8 U.S.C. 1182, 1225 (Supp. V 1999)), and established "removal" proceedings to take the place of "deportation" and "exclusion" proceedings (*e.g.*, 8 U.S.C. 1229a (Supp. V 1999)).

In this brief, we use pre-IIRIRA terminology when discussing historical facts relating to the entry of petitioner's final deportation order under the former statutory framework and when discussing cases decided under pre-IIRIRA law. Elsewhere, we use the current "removal" terminology.

[12] In addition to the permanent provision of IIRIRA codified at 8 U.S.C. 1231(a)(6) (Supp. V 1999), IIRIRA also contained transition period custody rules that governed the detention of certain aliens during the first two years following enactment of IIRIRA, pursuant to certification by the Attorney General that there was insufficient detention space. See IIRIRA § 303, 110 Stat. 3009-585 to 3009-587. Those rules provided a standard for release of lawfully admitted aliens similar to that set forth in the INA immediately prior to enactment of AEDPA. IIRIRA § 303(b)(3)(B)(i), 110 Stat. 3009-587. In addition, the rules provided that an alien who was not lawfully admitted, and who could not "be removed because the designated country of removal will not accept the alien," could be released if he similarly satisfied the Attorney General that he would "not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." IIRIRA § 303(b)(3)(B)(ii), 110 Stat. 3009-587.

The augmented provisions for detention in AEDPA and IIRIRA represented Congress's considered response to what it perceived to be substantial deficiencies in the system previously employed for deporting aliens from this country. Congress viewed immigration detention as a solution to the pressing national problem that had arisen due to the widespread commission of crimes by criminal aliens after being released by the INS during the deportation process,[13]

Both the magistrate judge and the district court were cognizant of the enactment of AEDPA and IIRIRA during the pendency of petitioner's habeas corpus proceedings. See J.A. 92 (magistrate judge declining to determine whether Section 440 of AEDPA, 110 Stat. 1276, should be applied to petitioner's case because he had already determined that petitioner was not entitled to relief under the more lenient pre-AEDPA law); J.A. 91 n.8 (magistrate judge stating that the transition period custody rules of IIRIRA § 303(b), 110 Stat. 3009-586, allowed petitioner to apply for a bond redetermination and that the INS had determined that bond would be denied); J.A. 139 n.4 (district court stating that the INS denied petitioner bond under the recently enacted transition period custody rules of IIRIRA).

[13] In floor debates preceding enactment of AEDPA, one of the sponsors of the bill explained that "recidivism rates for criminal aliens are high," citing a Government Accounting Office (GAO) study that found that "77 percent of noncitizens convicted of felonies are arrested at least one more time." 142 Cong. Rec. 7972 (1995). A GAO report published in July of 1997 revealed, for example, that approximately 2000 criminal aliens were released from prison in the second half of fiscal year 1995 before their deportation proceedings were completed and without assessment of the risk they posed to the public. The INS tracked the post-release criminal activity of 635 of those criminal aliens and found that 23 percent had been rearrested for crimes, including 184 felonies. General Accounting Office, *Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Need to be Improved* 1, GAO/T-GGD-97-154 (July 15, 1997).

as well as the disappearance of criminal aliens who were released.[14]

In particular, 8 U.S.C. 1231(a)(6) (Supp. V 1999), as enacted by IIRIRA, reflects Congress's determination that, when faced with the difficult situation of an alien under a final order of removal who has no right whatsoever to be in this country but who cannot be removed within the 90-day removal period provided for in 8 U.S.C. 1231(a)(1) (Supp. V 1999), the Attorney General must be granted sufficient authority to determine in each case how best to serve the various competing interests. Those interests include protecting the community from future harm by aliens adjudged not to be lawfully part of the community, ensuring the ultimate effectuation of removal orders, and releasing aliens where such release would not be inconsistent with the other interests.[15]

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[14] An April 7, 1995 report issued by the Senate Committee on Governmental Affairs noted that "[o]ver 20 percent of nondetained criminal aliens fail to appear for deportation proceedings" and that "[u]ndetained criminal aliens with deportation orders often abscond upon receipt of a final notification from the INS that requires them to voluntarily report for removal." S. Rep. No. 48, 104th Cong., 1st Sess. 2 (1995); *id.* at 24 ("In New York, for example, in fiscal year 1993, out of 1695 such notices to surrender sent to criminal and non-criminal aliens, 1486, or 87.7 percent failed to surrender."). A March 1996 report by the Department of Justice, Office of the Inspector General, *Deportation of Aliens After Final Orders Have Been Issued*, "found that 89 percent of non-detained aliens with final orders of deportation failed to surrender for deportation when ordered to do so by the [INS]." 62 Fed. Reg. 48,183 (1997); see also 62 Fed. Reg. 10,312, 10,323 (1997).

[15] When Congress enacted IIRIRA, it recognized that the government may have an interest in releasing aliens on conditions of supervision, rather than maintaining them in detention, in order to ease administrative and financial burdens on the INS. See IIRIRA § 303(b)(2), 110 Stat. 3009-586 (providing for up to two years' delay of effective date of 8 U.S.C. 1226(c) (Supp. V 1999), which mandates detention of certain criminal aliens during removal proceedings, if Attorney General notifies Congress that there is insufficient detention space and INS personnel available to implement the provision). Nonetheless, Congress clearly intended that, under IIRIRA, the Attorney General would increase the INS's detention of criminal aliens by retaining in custody those aliens whose release would pose a risk to the community or a probability of flight. See 8 U.S.C. 1368 (Supp. V 1999) (requiring Attorney General, subject to availability of appropriations, to increase INS detention facilities and to report semiannually to Congress estimates of: the detention space needed to implement IIRIRA's detention provisions (including Section 1231(a)(6)); the number of criminal aliens (and separately the number of aggravated felons) who were released into the community by the INS; and the number of aliens released into the community by the INS due to a lack of detention facilities notwithstanding circumstances the Attorney General believed justified detention); IIRIRA § 387, 110 Stat. 3009-655 (providing for pilot programs to determine feasibility of using closed military bases as INS detention centers).

2. *Congress's authorization to detain dangerous aliens under final orders of removal is consistent with this Court's due process precedents*

a. This Court has upheld exercises of detention authority by the Attorney General over aliens based on the threat of harm to the community that Congress determined would be posed by their release. In *Mezei*, the Court upheld against constitutional challenge the continued detention of an alien who had been ordered excluded (based on nondisclosed evidence and without a hearing) pursuant to a finding that the alien's "entry would be prejudicial to the public interest for security reasons." 345 U.S. at 208. The alien was returning from a 19-month trip abroad to his home in the United States where he had lived for 25 years, but he was adjudged to be permanently excludable from the United States because of the risk to the community that it was believed he would pose. The Court ruled that the continued detention of that alien on Ellis Island, because no country could be located to accept him, did not deprive the alien of any statutory or constitutional right. *Id.* at 215. While acknowledging the resulting hardship caused to the alien,

the Court deferred to Congress, noting that "the times being what they are, Congress may well have felt that other countries ought not shift the onus to us; that an alien in respondent's position is no more ours than theirs." *Id.* at 216. "Whatever our individual estimate of that policy and the fears on which it rests," the Court reasoned, "[the alien's] right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate." *Ibid.* (citing *Harisiades*, 342 U.S. at 590-591).

In *Carlson*, the Court upheld the Attorney General's exercise of discretionary authority to detain certain aliens during the pendency of their deportation proceedings based on a determination that the aliens' release "would be prejudicial to the public interest and would endanger the welfare and safety of the United States" (because the aliens had participated to varying degrees in Communist activities), notwithstanding the aliens' many years' residence in this country without causing such harm, their family connections, and their adherence to previously imposed bail conditions. 342 U.S. at 529-530. The Court rejected the aliens' argument, analogous to petitioner's here, that their detention violated the Fifth Amendment because it was not based on a fear that they would fail to appear for hearings or for deportation. *Id.* at 533-534. The Court made it clear that risk of flight is not the only governmental interest that justifies immigration detention, explaining that "[d]etention is necessarily a part of th[e] deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings." *Id.* at 538. Moreover, the Court observed, because "purpose to injure" could not be imputed to all aliens subject to deportation, Congress properly granted the Attorney General discretion to determine which aliens to detain on that ground. *Ibid.*

The Court in *Carlson* thus upheld the authority of the Attorney General to determine whether an individual alien would pose a risk to the community if released, noting that "the discretion as to bail in the Attorney General was certainly broad enough to justify his detention of all the[] parties without bail as a menace to the public interest." 342 U.S. at 541; see also *id.* at 542-544. The Court concluded by declaring that "[t]here is no denial of the due process of the Fifth Amendment under circumstances where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government." *Id.* at 542.

As in *Mezei* and *Carlson*, there is no denial of due process in this setting if the Attorney General determines that there is a reasonable apprehension of harm to the community by an alien (like petitioner) who is under a final order of deportation and has engaged in serious criminal conduct in the past, as evidenced by his conviction of an aggravated felony. The government's interest in protecting the community from the threat of harm posed by such an alien is a legitimate objective and has been "historically so regarded." *Kansas* v. *Hendricks*, 521 U.S. 346, 363 (1997).

b. The *Mezei* and *Carlson* cases demonstrate that petitioner's general proposition (Br. 8, 9, 10, 13-17, 19)—that detention of an alien cannot be based on future dangerousness—is wrong.[16] The decisions on which peti-

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[16] The INS's determination not to release petitioner in this case was based on the risk of flight he would pose if released, as well as the risk of harm to the community he would pose. Petitioner has a long and serious record of flight, including three failures to appear on a burglary charge, failure to return in a timely manner after release on a furlough, a failure to appear at his original deportation hearing after having been released by the INS on conditions, flight from law-enforcement officials after being charged with a serious drug-trafficking crime, and his five-year fugitive status on that charge. See pp. 3-4, *supra*. Indeed, in denying petitioner's request for release on bond during the pendency of his deportation proceedings, the IJ explained that "[i]t is not really necessary" to decide

tioner relies (Br. 13-17) are not to the contrary. None of those cases involved the detention of an alien, let alone an alien under a final order of deportation who has been adjudicated to have no legal right to remain in this country. Moreover, the Court *upheld* the constitutionality of detention based on future dangerousness in two of those cases, *Kansas* v. *Hendricks*, 521 U.S. 346 (1997), and *United States* v. *Salerno*, 481 U.S. 739 (1987), both of which involved the detention of citizens. A fortiori, they do not stand for the proposition that the detention of aliens in the circumstances presented here is unconstitutional.

The *Hendricks* Court explained that a significant liberty interest of the individual was at stake there because of his involuntary civil commitment under a sexually violent predator statute, but emphasized that the individual's liberty interest in that setting "is not absolute" and "may be overridden even in the civil context" in certain circumstances.

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whether petitioner would pose a threat to the community if released, because petitioner's "five year flight from prosecution and the information brought out by the [INS] on cross-examination casts serious doubt on [petitioner's] likelihood to appear at future hearings." J.A. 8. Although petitioner now attempts to discount the risk of flight as a basis for his detention by the INS (see Br. 13-14), the district court expressly found that, "[c]onsidering petitioner's recidivist history and his prior episode of 'bond jumping,' petitioner has not met his burden of proving that he is not a threat to the community and that he is likely to appear for scheduled hearings." J.A. 139. The court of appeals embraced that district court finding, noting that, should petitioner no longer pose such a danger or flight risk, "he would doubtless be released." J.A. 204-205.

Petitioner errs in contending that the government's interest in ensuring his availability for removal is not a justification for his detention because that interest "becomes as remote as departure itself." Pet. Br. 14. For the reasons discussed below, petitioner unduly discounts the likelihood of his removal. See pp. 47-49, *infra*. But because petitioner does not challenge the general validity of risk of flight as a basis for immigration detention, we discuss further only his challenge to future dangerousness as a basis for immigration detention.

521 U.S. at 356. The Court concluded that, because the statute was limited to persons who were found to pose a risk of future dangerousness and were unable to control their dangerousness, the statute "adequately distinguishe[d]" the detainees "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings" and, therefore, "plainly suffice[d] for due process purposes." 521 U.S. at 360.

Similarly, the *Salerno* Court, in the course of upholding pretrial detention based on future dangerousness, rejected the argument that future dangerousness could not justify detention, explaining that the Court has "repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." 481 U.S. at 748. Significantly, among the examples cited in *Salerno* were the Court's previous holdings that there is "no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings." *Ibid.* (citing *Carlson* and *Wong Wing*, *supra*). The Court recognized the liberty interest at stake in *Salerno*, but, relying on its cases holding that an individual's liberty interest "may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society," concluded that the federal pretrial detention statute satisfied that standard. 481 U.S. at 750-751; cf. *id.* at 752-753 (rejecting argument that, because "a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants," the Eighth Amendment prohibits the government from restricting pretrial release to serve compelling interests other than risk of flight, such as protecting society from dangerous persons). Similarly here, in light of the deference due the judgment of Congress and the Executive in immigration matters, the government's interest in preventing the release into society of an alien who is awaiting removal from this country, and who has been determined by the Attorney

General to pose a risk to the community if released, is sufficiently weighty to justify detention.

3. *Petitioner's prior long-time residency in this country does not render his detention unconstitutional, because his right to remain here has been terminated*

a. Petitioner is wrong in contending (Br. 21-25) that his long-time presence in this country entitles him to more stringent constitutional limitations on detention than the court of appeals afforded him.

Despite petitioner's 44 years of residency in this country, he never obtained United States citizenship. This Court has made clear that aliens who "fail to obtain and maintain citizenship by naturalization * * * remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders." *Carlson*, 342 U.S. at 534. As the Court has recognized, the fact that "aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state." *Harisiades*, 342 U.S. at 587-588.

Congress's plenary power over aliens does not, however, render the Due Process Clause of the Fifth Amendment altogether inapplicable to petitioner. As the court of appeals acknowledged, petitioner and other aliens "can of course claim some constitutional protections." J.A. 207 (also noting that, under Fifth Circuit precedent, even excludable aliens who fail to effect an entry into the United States are considered persons entitled to protection under the Fourteenth Amendment (citing *Lynch* v. *Cannatella*, 810 F.2d 1363, 1375 (1987)). Cf. *Jean* v. *Nelson*, 472 U.S. 846 (1985) (remanding for consideration of how discretion was exercised under statute and declining to reach constitutional issue of whether Fifth Amendment applies to consideration of un-

admitted aliens for parole); *Plyler* v. *Doe*, 457 U.S. 202 (1982) (holding that alien children who were not legally admitted into United States were "persons" entitled to claim benefit of Equal Protection Clause of Fourteenth Amendment). But the fact that petitioner is a "person" protected by the Due Process Clause does not determine what process is "due" under that Clause. Furthermore, in determining what process (both procedural and substantive) is due, substantial weight must be given to the good faith judgments of Congress and of the Attorney General, to whom Congress has assigned the responsibility for administering the INA and for weighing the relevant factors in doing so. *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976).

b. The court of appeals in this case reasonably held that, for purposes of due process scrutiny of immigration detention, petitioner stands on essentially the same footing as an excludable alien who has been ordered removed after seeking to enter the United States. The alien's lack of a right to be present in the United States, and the government's countervailing interests in protecting against danger to the community and effectuating removal, are the same in the two situations. See J.A. 206-211, 219-227; see also *Ho* v. *Greene*, 204 F.3d 1045, 1058-1059 (10th Cir. 2000) (once a final order of deportation has been entered against a resident alien, that alien has no greater right with respect to release into this country than does an alien seeking to enter the country for the first time) (citing *Mezei*, 345 U.S. at 213).

Petitioner has exhausted all avenues of possible relief from deportation, and the final order of deportation extinguished his status as a lawful permanent resident and eliminated any legal right he had to remain here. See 8 U.S.C. 1101(a)(20) (1994); 8 U.S.C. 1101(a)(47)(B)(ii) (Supp. V 1999); 8 C.F.R. 1.1(p). As the court of appeals put it, "[w]hen a former resident alien is * * * finally ordered deported, the decision has irrevocably been made to expel him from the national community. Nothing remains but to effectuate

this decision." J.A. 224. Petitioner remains in this country only because his final deportation order has not yet been effectuated.

The fact that petitioner has no legal right to be in this country means that he has no right to maintain ties with members of the community by maintaining a continued presence at large in our society, regardless of the length of his prior residency here. Thus, the remaining interests petitioner has at stake at this point are substantially different from, for example, those of the alien in *Landon* v. *Plasencia*, 459 U.S. 21 (1982), who had developed ties to this country as a long-term resident and still had the possibility of establishing, during exclusion proceedings, that she should be allowed to retain her status as a lawful permanent resident and maintain those ties. See *Ho* v. *Greene*, 204 F.3d at 1059.

The United States' interests in protecting its national sovereignty, in not allowing recalcitrance on the part of another country in accepting the return of its citizens to dictate the presence of foreign nationals at large in this country, and in protecting our society from any such foreign nationals who would pose a danger if released, are the same in the case of an alien under a final order of deportation, regardless of his prior residency here, as they are in the case of an alien who has never resided here. The only act remaining to be carried out in both cases is the actual removal of the alien.

Congress, as the Branch of government having plenary authority to establish policies affecting aliens, regards the United States' interest to be analogous in detaining a former resident alien and an alien who never entered the country, at the point at which either is under a final order of removal. In 8 U.S.C. 1231(a)(6) (Supp. V 1999), Congress vested the Attorney General with the discretionary authority to detain beyond the removal period both aliens who were admitted to the country but subsequently ordered deported on one of the

specified grounds, regardless of how long they resided in this country (*i.e.* aliens "removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4)" of Title 8), and aliens who were never admitted to this country and never resided here (*i.e.* aliens "inadmissible under section 1182" of Title 8). 8 U.S.C. 1231(a)(6) (Supp. V 1999). And Congress made no distinction between aliens who have resided in this country, regardless of how long, and aliens who have never resided here, when it authorized the Attorney General to detain beyond the removal period any alien she determines "to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6) (Supp. V 1999).[17]

Treating aliens under a final order of removal in the same manner, regardless of whether they are former residents being expelled or applicants being barred from entering, is wholly consistent with the scope of the political Branches' authority over aliens, as this Court has long recognized:

> The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.
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> * * * * *
>
> The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source,

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[17] Indeed, in IIRIRA, Congress took a significant step toward eliminating distinctions between the treatment of resident aliens and aliens applying for admission when it created one new proceeding, termed a "removal" proceeding, in which to determine both expulsion and exclusion cases, replacing the formerly distinct deportation and exclusion proceedings. See note 11, *supra*.

are supported by the same reasons, and are in truth but parts of one and the same power.

Fong Yue Ting v. *United States*, 149 U.S. 698, 707, 713 (1893).

That is not to say that the status of an alien—be it his presence outside of the country, his lawful permanent residence in this country, or some other feature—cannot be relevant to certain due process inquiries. *Plasencia*, for example, illustrates that presence outside the United States may be significant for some purposes, whereas long-time residency may be relevant for others. The Court held in *Plasencia* that an alien making a physical re-entry to the country was properly placed in exclusion proceedings as an alien seeking admission, notwithstanding the fact that she was a lawful permanent resident claiming that she should not be considered to be making an entry and should, instead, be placed in deportation proceedings based on her permanent resident status. 459 U.S. at 27-28. The Court further held, however, that, as a permanent resident alien, she had developed ties to the country that entitled her to more procedural due process protections during her exclusion hearing than would be due an alien who was not a permanent resident. *Id.* at 32-34. Significantly, the dispositive fact in that procedural due process analysis was not that the alien was physically present in the country, because she was not (she was detained at a port of arrival), but rather the particular interest of the alien that was at stake—whether she could remain a permanent resident of the country and maintain her ties thereto—considered in light of the competing governmental interests. *Id.* at 34; see also *Flores*, 507 U.S. at 302 ("'[s]ubstantive due process' analysis must begin with a careful description of the asserted right"). As the court of appeals in this case explained, the fact that aliens outside the United States "are entitled to a lesser degree of procedural due process in proceedings to

determine whether they may enter the country stems ultimately not from their status as such, but rather from the nature of what is asserted." J.A. 220.

In *Mezei*, the nature of the alien's interest was also the focus of the Court's analysis, not simply the fact that he was outside of the country. Like petitioner, the alien there had been a long-time resident of the United States (for 25 years), but the Court did not find that that status entitled him to heightened due process protections even in his exclusion proceedings. Because the alien had been gone from the country for approximately 19 months, he did not have an interest in maintaining ties to the country analogous to that of a current resident alien. Other cases cited by petitioner illustrate that an alien's status affects the due process analysis in cases where the governmental interest at stake is not based on the federal government's authority over aliens. *E.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (distinguished in *Fong Yue Ting*, 149 U.S. at 725, as presenting the question "of the power of a State over aliens continuing to reside within its jurisdiction, not of the power of the United States to put an end to their residence in the country"); *Plyler* v. *Doe*, *supra*; see *Mathews* v. *Diaz*, 426 U.S. 67, 84-87 (1976).

The fact that an alien is under a final deportation order does not mean that such an alien has no substantive due process rights at all. Although an order eliminates the alien's right to be at large in this country and, therefore, diminishes the substantive interest at stake in detention decisions, it does not, for example, eliminate an alien's interest in not being subject to punishment by imprisonment at hard labor without a judicial trial to establish his guilt. *Wong Wing*, 163 U.S. at 235 (distinguishing punishment at hard labor from detention of an alien subject to deportation). In sum, the due process analysis turns not only on the status of the person as an alien, but rather also on the nature of the alien's interest that is at stake, considered in light of the

governmental purposes furthered by the challenged governmental action.

C. Detention Of Aliens Such As Petitioner Under Section 1231(a)(6) Is Not Unconstitutionally Indefinite Or Excessive

Petitioner's characterization of his detention as indefinite (Br. 16, 25) and excessive (Br. 20) is both erroneous and legally insufficient to render his detention in the present circumstances a violation of substantive due process.

1. Petitioner's detention cannot fairly be characterized as permanent or indefinite, in light of (a) the existence of administrative procedures that provide for a periodic and meaningful review of petitioner's custody, and (b) the possibility that continued diplomatic efforts with Lithuania, Germany, or Russia may result in petitioner's removal. The future termination of petitioner's detention was not demarcated by a specific event, unlike an alien's mandatory detention pending removal proceedings or his detention during the 90-day removal period. But continued detention under Section 1231(a)(6) is limited by the Attorney General's administrative review procedures.[18] Petitioner's detention

[18] The INS's interim regulations implementing the permanent detention provisions of IIRIRA, 8 C.F.R. 241.4, were not promulgated until March 6, 1997, and they became effective on April 1, 1997. 62 Fed. Reg. 10,312. That was after the magistrate judge's February 3, 1997, report and recommendation in this case, and only a few months before entry of the district court's judgment in October 1997. The INS's memoranda implementing further procedures for custody reviews of aliens detained beyond the removal period (see App., *infra*, 27a-39a; see p. 43, *infra*) were not issued until 1999. Because petitioner was released in late 1997 pursuant to the district court's order, the question of his detention was not reviewed by the INS under the supplementary procedures.

On appeal, the court of appeals relied on the custody review procedures in effect at the time of its consideration of the case because the INS's detention of petitioner would now be governed by 8 U.S.C. 1231(a)(6)

would cease under those procedures if he established that he no longer posed a risk to the community and that he was likely to be available for removal, and those procedures afford an ongoing opportunity to make such a showing. See *Chi Thon Ngo* v. *INS*, 192 F.3d 390, 399 (3d Cir. 1999) (interim procedures "provide[d] reasonable assurance of fair consideration" of an alien's suitability for release pending his removal from the United States), as amended on Dec. 30, 1999; see also 65 Fed. Reg. 80,281, 80,285 (2000) ("approximately 6,200 aliens have been provided custody reviews by district directors during the period from February 1999 through mid-November 2000, to determine whether detention of the alien beyond the 90-day removal period is warranted"; "[o]f those aliens, approximately 3,380 were released").[19] Also, the INS's detention of petitioner would

(Supp. V 1999) and those implementing regulatory procedures. J.A. 200-203; cf. *Ho* v. *Greene*, 204 F.3d at 1055 n.8 (declining to decide which version of the statute governs the continued detention of an alien who was under a final order of deportation at the time of IIRIRA's effective date). When the court of appeals reversed the judgment of the district court, it stayed its mandate. J.A. 3. The district court's order that petitioner be released therefore remains in effect. If this Court affirms the court of appeals' judgment, the INS will then decide whether petitioner should be returned to custody under the current standards.

[19] Petitioner's characterization of the nature and actual length of the detention at issue here is inaccurate. For example, petitioner asserts that, "[b]ut for the district court's grant of habeas corpus [relief], his incarceration would now have stretched into six years." Pet. Br. 15; see also *id.* at 8. He also asserts (Br. 25) that "without relief from this Court, he will languish in jail forever." See also *id.* at 7 (claiming that he "will return to prison if this Court rules against him").

But this case does not involve mandatory detention. The issue here is whether the Attorney General has the authority, consistent with the Constitution, to continue to detain an alien such as petitioner in the exercise of the discretion granted her by Congress. Petitioner's statements wholly disregard the INS's periodic administrative custody reviews and the possibility that, if petitioner had not been released pursuant to

necessarily cease upon his removal from this country—a matter that continues to be the subject of INS efforts.

On March 6, 1997, the Attorney General promulgated regulations setting forth the manner in which she would exercise her discretion to detain or release aliens under Section 1231(a)(6). See 62 Fed. Reg. 10,312. Those regulations authorized INS district directors to release aliens who demonstrated that they would not pose a danger to the community or a significant flight risk if released. See 8 C.F.R. 241.4 (set forth at App., *infra*, 7a-8a). The regulations set forth a non-exhaustive list of factors that the district directors could consider in making that determination: the nature and seriousness of criminal convictions; other criminal history; sentence(s) imposed and time actually served; history of failures to appear; probation history; disciplinary problems while in custody; evidence of rehabilitative efforts or recidivism; equities in the United States; and prior immigration violations and history. 8 C.F.R. 241.4.

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court order, he might have been released by the INS under its custody review procedures.

Moreover, the length of the specific period of detention at issue here—post-removal-period custody as authorized currently under 8 U.S.C. 1231(a)(6) (Supp. V 1999)—was less than the four years petitioner repeatedly claims (Br. 8, 13, 15, 16). Petitioner's removal order became final on May 2, 1994. At that time, the INA afforded the Attorney General six months in which to remove an alien. That period did not expire for petitioner until approximately November 2, 1994. Petitioner filed the instant habeas corpus action in September 1995, at which time he had been in post-removal-period custody for approximately 10 months. The district court ordered his release on October 30, 1997, a total of approximately three years after expiration of his removal period. During some of that time, *i.e.*, from the enactment of AEDPA on April 24, 1996, to the October 8, 1996, effective date of the transition period custody rules (see note 12, *supra*), the Attorney General was not authorized by statute to release petitioner because he was subject to mandatory detention as an aggravated felon under 8 U.S.C. 1252(a)(2), as amended by AEDPA § 440(c), 110 Stat. 1277.

District directors also were authorized to consider other factors that were not specifically listed. 8 C.F.R. 241.4(a). Aliens who had been detained during the removal period were allowed to request a formal custody review by the INS district director after their deportation orders became final and could appeal any resulting denial to the Board of Immigration Appeals (BIA). See 8 C.F.R. 236.1(d)(2)(ii) and (3)(iii), 241.4, 241.5.

As a supplement to that regulatory procedure, the INS Executive Associate Commissioner issued a memorandum in February 1999 that established additional procedures, under which the custody status of detained aliens whose removal was not immediately practicable would be subject to automatic review during the initial 90-day removal period and (if the alien was not released) every six months thereafter. App., *infra*, 27a-31a. In August 1999, the Executive Associate Commissioner issued a second memorandum that instituted still further procedures, which included centralized review by a special post-order detention unit in INS Headquarters of the custody status of detained aliens such as petitioner. App., *infra*, 32a-39a. Those procedures were effective immediately and are the procedures described by the court of appeals. See J.A. 203-205. They were intended to operate on an interim basis, pending anticipated permanent changes to the regulations themselves.

At the same time those interim procedures were issued, the Attorney General and the Commissioner announced their intention to promulgate new regulations establishing a formal program for reviewing the continued custody under Section 1231(a)(6) of aliens who are not removed during the 90-day removal period. Those regulations were to be modeled after the regulations establishing the Cuban Review Plan, 8 C.F.R. 212.12, which has been in place for a number of years to review the status of Mariel Cubans—Cubans who came to the United States during the Mariel boatlift between April 15 and October 1980, see 8 C.F.R.

212.12(a)—who have been ordered excluded from the United States but who cannot be returned to Cuba at this time. On June 30, 2000, the INS published proposed regulations. 65 Fed. Reg. 40,540. Those regulations were published in final form on December 21, 2000, and are now in effect. 65 Fed. Reg. 80,281-80,298; see App., *infra* 9a-26a. The current regulations are not substantially different in relevant respects from the proposed regulations published in June.

Under the now-current regulations, the INS district director maintains responsibility for the initial review of an alien's custody when the alien's immediate removal is not practicable at the expiration of the 90-day removal period. The district director conducts a record review, including a review of any materials the alien may want to submit, and has the discretion to interview the alien. See 65 Fed. Reg. at 80,295-80,296. If the district director decides to continue the alien in custody at that point, authority over the alien's detention is then transferred to a post-order detention unit at the INS Headquarters, either at the end of the 90-day removal period or within three months thereafter. That unit will then commence a custody review within 30 days of the transfer of detention authority. *Id.* at 80,291.

If the initial headquarters review of the alien's records does not result in a decision to release the alien, he is interviewed by a two-member panel of INS officers, who make a recommendation to the headquarters unit, as under the Mariel Cuban Review Plan. See 65 Fed. Reg. at 80,296. The headquarters unit then makes the final decision whether to release the alien at that point or to continue him in detention. If the alien is not released, his custody status is again reviewed under the headquarters review process within one year, if the alien has not been removed since the last review. *Id.* at 80,297; cf. *Hendricks*, 521 U.S. at 364 (upholding civil commitment of sexually violent predator as "only *potentially* indefinite" because a determination regarding commitment must be made annually, thereby demonstrating that the

State does not intend a detainee to remain in custody beyond the period during which he continues to present a threat of dangerousness). The headquarters unit may review an alien's custody at more frequent intervals, upon request of the alien based on a material change in circumstances since the last annual review. 65 Fed. Reg. at 80,297. The alien receives advance, written notice of custody reviews, is afforded an opportunity to submit any relevant material for consideration by INS officials, and may be assisted by a representative of his choice during the review process. *Ibid.*

Petitioner asserts that these elaborate administrative safeguards are inadequate. But petitioner mischaracterizes the process, claiming that "[t]he INS custody review procedures do not cure the substantive due process violation" because, in petitioner's view, "they omit consideration of key factors in the balancing test from the director's decision to detain." Pet. Br. 9. Specifically, petitioner asserts that the relevant INS regulation "omits from the director's periodic reviews of continued detention consideration of both the length of detention, and the future likelihood of deportation being effected." Br. 15. But that is not true. The INS regulation provides a nonexclusive list of factors that the administrative decisionmakers may consider and allows consideration of other relevant factors, including those factors cited by petitioner. See 65 Fed. Reg. at 80,288.

Petitioner's objection (Br. 15) to having the district director be the decisionmaker disregards the supplemental procedures that were implemented by the INS in 1999 and formalized by regulation to provide for centralized decisionmaking by a specialized unit in the INS Headquarters, analogous to the process that has successfully been applied to the periodic custody reviews for Mariel Cubans. That

centralized decisionmaking has been enhanced in the final regulations. See 65 Fed. Reg. at 80,295.[20]

Contrary to petitioner's contention (Br. 15 & n.5), the fact that the INS's custody review process does not call for all of the same procedures that the pretrial detention statute at issue in *Salerno* provided does not render it constitutionally deficient. Unlike the criminal defendants in *Salerno*, petitioner has absolutely no legal right to be in the United States. He is subject to a final order of deportation that extinguished all such rights. Also, the fact that the Attorney General may release aliens on conditions does not mean (see Pet. Br. 9, 21) that the Constitution bars her from concluding that such conditions are not sufficient in some cases to protect against the risk of harm or flight an alien would pose if released.

2. Detention of aliens under 8 U.S.C. 1231(a)(6) (Supp. V 1999) is not unconstitutionally excessive in relation to the interests the government seeks to protect. As the State did in *Hendricks*, Congress has adequately distinguished the persons who may be detained under Section 1231(a)(6) from those who are dealt with exclusively through criminal proceedings.[21] Only aliens who are under a final order of re-

[20] The current regulations no longer include the "clear and convincing" evidence standard to which petitioner objects (Br. 14). Instead, they provide that the Attorney General may release an alien "if the alien demonstrates to the satisfaction of the Attorney General or her designee that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal from the United States." See 65 Fed. Reg. at 80,295.

[21] Restricting the Attorney General's authority over aliens subject to final removal orders to criminal prosecution, as petitioner suggests (Br. 21), would not adequately further the government's interests. Prosecution of such aliens could further delay their removal from this country during the duration of their criminal sentences, while further burdening law enforcement and prison resources for a longer period of time. See 8 U.S.C. 1231(a)(4)(A) (Supp. V 1999) (providing that, except in limited circumstances, "the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment").

moval may be detained by the Attorney General under Section 1231(a)(6). Thus, Section 1231(a)(6) applies only if an alien has already been finally adjudged to lack any underlying right to remain in the United States, and therefore has a greatly diminished liberty interest in living at large in this country. In addition, in order to be detained under Section 1231(a)(6), the alien must be inadmissible; be deportable on certain specified grounds, such as for the commission of an aggravated felony or for conduct endangering public safety or national security; or be determined by the Attorney General to pose a risk to the community or to be unlikely to comply with the removal order. Cf. *Salerno*, 481 U.S. at 747 (statute limited detention to persons who were involved in serious crimes). Moreover, INS's administrative procedures guard against detention that is not related to legitimate government interests.

3. Petitioner's claim that he currently is stateless and not a citizen of any country (Br. 5, 8 n.4, 17) does not mean that he cannot be removed—or, as petitioner would have it, that any detention of him by the INS is unconstitutionally excessive, regardless of the risk to the community or of flight he would pose if released.

The court of appeals correctly ruled that it cannot "now be said with any real assurance" that petitioner "will never be deported." J.A. 212. The court of appeals properly deferred to the Executive Branch in this matter of immigration and foreign policy. Diplomatic efforts are committed by the Constitution to the Executive Branch, which—because of its special expertise and access to information—is responsible for bringing about their success and is best situated to predict whether that will happen. Having reviewed the voluminous record provided by petitioner and the government, the court of appeals provided a detailed summary of the INS's

efforts to remove petitioner to either Lithuania or Germany. J.A. 194-195. It then concluded that, even if petitioner's removal may seem "problematical, difficult, and distant" in the present circumstances, that is not sufficient— "[g]iven the traditional deference [courts] show to the other branches in matters of immigration policy"—for petitioner to meet the very high burden of showing that "deportation is impossible." J.A. 219. See also *Ngo*, 192 F.3d at 398 (concluding "[i]t is extremely unlikely" that the prolonged detention of an excludable alien from Vietnam would be permanent, in light of the diplomatic efforts between the United States and Vietnam to negotiate a repatriation agreement, even though the court characterized the negotiations as proceeding at an "agonizingly slow" rate).[22]

[22] The court of appeals observed that "[c]ertainly there has been no definitive denial by Lithuania of any application for citizenship by [petitioner]." J.A. 216. Subsequent to the court of appeals' decision, the INS has made additional efforts to pursue the process necessary for petitioner to apply for Lithuanian citizenship based on his parents' Lithuanian citizenship. Although petitioner states (Br. 7) that "[a]t the INS's instruction in March of 2000," he "reapplied for Lithuanian citizenship," the letter he proffers (hand-dated March 27, 2000, unaccompanied by proof of mailing) does not purport to comply with various application requirements (including payment of an application fee), as the Lithuanian Consulate General has indicated is necessary. When the INS obtained a letter from the Lithuanian Consulate General to INS Deportation Officer Paul Barrows, dated March 31, 2000, regarding those application requirements, the INS notified petitioner that he must report to the INS office to review his immigration status. See INS Form G-56 dated April 24, 2000 (scheduling appointment for May 4, 2000). Petitioner informed the INS that he could not keep that appointment and requested that it be rescheduled. *Ibid.* But petitioner thereafter failed to keep two subsequently scheduled appointments. See INS Form G-56 dated May 16, 2000 (scheduling appointment for June 1, 2000); INS Form G-56 dated August 1, 2000 (scheduling appointment for August 18, 2000) (returned to INS as undeliverable). We are lodging copies of the relevant documents with the Clerk of this Court.

Moreover, petitioner has evidenced no attempt to pursue other avenues of obtaining travel documents from either Germany or Russia, as suggested by the court of appeals. J.A. 217-219 (noting two possibilities that remained unexplored: a claim by petitioner of German citizenship based on ethnic German ancestry through his mother, and a claim of Russian citizenship because of the Soviet Union's control over the birthplace of petitioner's parents at one time and the fact that some of petitioner's relatives live there). Petitioner's failure to make such efforts stands in sharp contrast to the efforts of Mr. Mezei, who "personally applied for entry to about a dozen Latin-American countries but all turned him down." *Mezei*, 345 U.S. at 209.

Further, the courts should be especially reluctant to second-guess Executive Branch judgments regarding the prospects of removing an alien, both because of the Executive's greater expertise and access to all the relevant information and communications, and because of the need for the Nation to speak with one voice on such matters. See J.A. 219; *Aguirre-Aguirre*, 526 U.S. at 425. Permitting the release of a former resident alien based on an ad hoc judicial determination regarding the probable length of his future detention would intrude into an area of confluence between the Executive's responsibilities for immigration enforcement and diplomacy, signal to other nations that their refusal to accept the repatriation of their own nationals who are detained under final orders of deportation may result in release of the aliens back into American society, and perhaps thereby cause those other nations to ignore or disclaim their responsibility to accept the return of their own nationals who have violated the laws of the United States. See *Barrera-Echavarria*, 44 F.3d at 1448 ("A judicial decision requiring that excludable aliens be released into American society when neither their countries of origin nor any third country will admit them might encourage the sort of intransigence Cuba has exhibited in the negotiations over the Mariel

refugees."); *Jean* v. *Nelson*, 727 F.2d 957, 975 (11th Cir. 1984) (en banc) ("[T]his approach would ultimately result in our losing control over our borders. A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back."), aff'd, 472 U.S. 846 (1985).

Thus, the court of appeals correctly concluded that, given the government's plenary authority over immigration policy and its interest "in effectuating deportation of a resident alien and expulsion of an excludable alien," the government "may detain a resident alien based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place." J.A. 227.[23]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[23] Petitioner suggests (Br. 10-11, 25-33) that the Court should avoid the constitutional question presented here by construing Section 1231(a)(6) to authorize detention "for only a reasonable time to effectuate removal." We address that argument in our briefs in *Reno* v. *Ma*, No. 00-38, which is consolidated with this case for oral argument. For the reasons more fully set forth in those briefs, such a construction of Section 1231(a)(6) would be inconsistent with the plain language of that Section, other statutory provisions governing detention of criminal aliens, the statutory history, and the Attorney General's interpretation of Section 1231(a)(6), to which deference is due under this Court's decision in *Aguirre-Aguirre*, 526 U.S. at 425.

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APPENDIX A

1. Section 1226 of Title 8 of the United States Code (Supp. V 1999), provides in relevant part:

Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a) of

this section, rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [*sic*] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney

General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

* * * * *

2. Section 1231(a) of Title 8 of the United States Code (Supp. V 1999), provides in relevant part:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in

detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that—

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.

APPENDIX B

Section 241.4 of Title 8 of the Code of Federal Regulations (1999) provided:

§ 241.4 Continued detention beyond the removal period.

(a) *Continuation of custody for inadmissible or criminal aliens.* The district director may continue in custody any alien inadmissible under section 212(a) of the Act or removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:

(1) The nature and seriousness of the alien's criminal convictions;

(2) Other criminal history;

(3) Sentence(s) imposed and time actually served;

(4) History of failures to appear for court (defaults);

(5) Probation history;

(6) Disciplinary problems while incarcerated;

(7) Evidence of rehabilitative effort or recidivism;

(8) Equities in the United States; and

(9) Prior immigration violations and history.

(b) *Continuation of custody for other aliens.* Any alien removable under any section of the Act other than section 212(a), 237(a)(1)(C), 237(a)(2), or 237(a)(4) may be detained beyond the removal period, in the discretion of the district director, unless the alien demonstrates to the satisfaction of the district director that he or she is likely to comply with the removal order and is not a risk to the community.

APPENDIX C

Section 241.4 of Title 8 of the Code of Federal Regulations as revised December 21, 2000, 65 Fed. Reg. 80,294-80,298 provides:

§ 241.4 Continued detention of inadmissible, criminal, and other aliens beyond the removal period.

(a) *Scope.* The authority to continue an alien in custody or grant release or parole under sections 241(a)(6) and 212(d)(5)(A) of the Act shall be exercised by the Commissioner or Deputy Commissioner, as follows: Except as otherwise directed by the Commissioner or his or her designee, the Executive Associate Commissioner Field Operations (Executive Associate Commissioner) or the district director may continue an alien in custody beyond the removal period described in section 241(a)(1) of the Act pursuant to the procedures described in this section. Except as provided in paragraph (b)(2) of this section, the provisions of this section apply to custody determinations for the following groups of aliens:

(1) An alien ordered removed who is inadmissible under section 212 of the Act, including an excludable alien convicted of one or more aggravated felony offenses and subject to the provisions of section 501(b) of the Immigration Act of 1990, Public Law 101-649, 104 Stat. 4978, 5048 (codified at 8 U.S.C. 1226(e)(1) through (e)(3)(1994));

(2) An alien ordered removed who is removable under section 237(a)(1)(C) of the Act;

(3) An alien ordered removed who is removable under sections 237(a)(2) or 237(a)(4) of the Act,

including deportable criminal aliens whose cases are governed by former section 242 of the Act prior to amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Public Law 104-208, 110 Stat. 3009-546; and

(4) An alien ordered removed who the decision-maker determines is unlikely to comply with the removal order or is a risk to the community.

(b) *Applicability to particular aliens.*—(1) *Motions to reopen.* An alien who has filed a motion to reopen immigration proceedings for consideration of relief from removal, including withholding or deferral of removal pursuant to 8 CFR 208.16 or 208.17, shall remain subject to the provisions of this section unless the motion to reopen is granted. Section 236 of the Act and 8 CFR 236.1 govern custody determinations for aliens who are in pending immigration proceedings before the Executive Office for Immigration Review.

(2) *Parole for certain Cuban nationals.* The review procedures in this section do not apply to any inadmissible Mariel Cuban who is being detained by the Service pending an exclusion or removal proceeding, or following entry of a final exclusion or pending his or her return to Cuba or removal to another country. Instead, the determination whether to release on parole, or to revoke such parole, or to detain, shall in the case of a Mariel Cuban be governed by the procedures in 8 CFR 212.12.

(3) *Individuals granted withholding or deferral of removal.* Aliens granted withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the Convention Against Torture who

are otherwise subject to detention are subject to the provisions of this part 241. Individuals subject to a termination of deferral hearing under 8 CFR 208.17(d) remain subject to the provisions of this part 241 throughout the termination process.

(c) *Delegation of authority.* The Attorney General's statutory authority to make custody determinations under sections 241(a)(6) and 212(d)(5)(A) of the Act when there is a final order of removal is delegated as follows:

(1) *District directors.* The initial custody determination described in paragraph (h) of this section and any further custody determination concluded in the three-month period immediately following expiration of the 90-day removal period, subject to the provisions of paragraph (c)(2) of this section, will be made by the district director having jurisdiction over the alien. The district director shall maintain appropriate files respecting each detained alien reviewed for possible release, and shall have authority to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews in his or her respective district.

(2) *Headquarters Post-Order Detention Unit (HQPDU).* For any alien the district director refers for further review after the 90-day removal period, or any alien who has not been released or removed by the expiration of the three-month period after the 90-day review, all further custody determinations will be made by the Executive Associate Commissioner, acting through the HQPDU.

(3) *The HQPDU review plan.* The Executive Associate Commissioner shall appoint a Director of the HQPDU. The Director of the HQPDU shall have authority to establish and maintain appropriate files respecting each detained alien to be reviewed for possible release, to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews.

(4) *Additional delegation of authority.* All references to the Executive Associate Commissioner and district director in this section shall be deemed to include any person or persons (including a committee) designated in writing by the district director or Executive Associate Commissioner to exercise powers under this section.

(d) *Custody determinations.* A copy of any decision by the district director or Executive Associate Commissioner to release or to detain an alien shall be provided to the detained alien. A decision to retain custody shall briefly set forth the reasons for the continued detention. A decision to release may contain such special conditions as are considered appropriate in the opinion of the Service. Notwithstanding any other provisions of this section, there is no appeal from the district director's or the Executive Associate Commissioner's decision.

(1) *Showing by the alien.* The district director or the Executive Associate Commissioner may release an alien if the alien demonstrates to the satisfaction of the Attorney General or her designee that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal

from the United States. The district director or the Executive Associate Commissioner may also, in accordance with the procedures and consideration of the factors set forth in this section, continue in custody any alien described in paragraphs (a) and (b)(1) of this section.

(2) *Service of decision and other documents.* All notices, decisions, or other documents in connection with the custody reviews conducted under this section by the district director or Executive Associate Commissioner shall be served on the alien, in accordance with 8 CFR 103.5a, by the Service district office having jurisdiction over the alien. Release documentation (including employment authorization if appropriate) shall be issued by the district office having jurisdiction over the alien in accordance with the custody determination made by the district director or by the Executive Associate Commissioner. Copies of all such documents will be retained in the alien's record and forwarded to the HQPDU.

(3) *Alien's representative.* The alien's representative is required to complete Form G-28, Notice of Entry of Appearance as Attorney or Representative, at the time of the interview or prior to reviewing the detainee's records. The Service will forward by regular mail a copy of any notice or decision that is being served on the alien only to the attorney or representative of record. The alien remains responsible for notification to any other individual providing assistance to him or her.

(e) *Criteria for release.* Before making any recommendation or decision to release a detainee, a majority of the Review Panel members, or the Director of the

HQPDU in the case of a record review, must conclude that:

(1) Travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest;

(2) The detainee is presently a non-violent person;

(3) The detainee is likely to remain nonviolent if released;

(4) The detainee is not likely to pose a threat to the community following release;

(5) The detainee is not likely to violate the conditions of release; and

(6) The detainee does not pose a significant flight risk if released.

(f) *Factors for consideration.* The following factors should be weighed in considering whether to recommend further detention or release of a detainee:

(1) The nature and number of disciplinary infractions or incident reports received when incarcerated or while in Service custody;

(2) The detainee's criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences imposed and time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history;

(3) Any available psychiatric and psychological reports pertaining to the detainee's mental health;

(4) Evidence of rehabilitation including institutional progress relating to participation in work, educational, and vocational programs, where available;

(5) Favorable factors, including ties to the United States such as the number of close relatives residing here lawfully;

(6) Prior immigration violations and history;

(7) The likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes, failures to appear for immigration or other proceedings, absence without leave from any halfway house or sponsorship program, and other defaults; and

(8) Any other information that is probative of whether the alien is likely to—

(i) Adjust to life in a community,

(ii) Engage in future acts of violence,

(iii) Engage in future criminal activity,

(iv) Pose a danger to the safety of himself or herself or to other persons or to property, or

(v) Violate the conditions of his or her release from immigration custody pending removal from the United States.

(g) *Travel documents and docket control for aliens continued in detention beyond the removal period—(1) In general.* The district director shall continue to

undertake appropriate steps to secure travel documents for the alien both before and after the expiration of the removal period. If the district director is unable to secure travel documents within the removal period, he or she shall apply for assistance from Headquarters Detention and Deportation, Office of Field Operations. The district director shall promptly advise the HQPDU Director when travel documents are obtained for an alien whose custody is subject to review by the HQPDU. The Service's determination that receipt of a travel document is likely may by itself warrant continuation of detention pending the removal of the alien from the United States.

(2) *Availability of travel document.* In making a custody determination, the district director and the Director of the HQPDU shall consider the ability to obtain a travel document for the alien. If it is established at any stage of a custody review that, in the judgment of the Service, travel documents can be obtained, or such document is forthcoming, the alien will not be released unless immediate removal is not practicable or in the public interest.

(3) *Removal.* The Service will not conduct a custody review under these procedures when the Service notifies the alien that it is ready to execute an order of removal.

(4) *Alien's cooperation.* Release will be denied if the alien fails or refuses to cooperate in the process of obtaining a travel document. *See, e.g.,* section 241(a)(1)(C) of the Act.

(h) *District director's custody review procedures.* The district director's custody determination will be developed in accordance with the following procedures:

(1) *Records review.* The district director will conduct the initial custody review. For aliens described in paragraphs (a) and (b)(1) of this section, the district director will conduct a records review prior to the expiration of the 90-day removal period. This initial post-order custody review will consist of a review of the alien's records and any written information submitted in English to the district director by or on behalf of the alien. However, the district director may in his or her discretion schedule a personal or telephonic interview with the alien as part of this custody determination. The district director may also consider any other relevant information relating to the alien or his or her circumstances and custody status.

(2) *Notice to alien.* The district director will provide written notice to the detainee approximately 30 days in advance of the pending records review so that the alien may submit information in writing in support of his or her release. The alien may be assisted by a person of his or her choice, subject to reasonable security concerns at the institution and panel's discretion, in preparing or submitting information in response to the district director's notice. Such assistance shall be at no expense to the Government. If the alien or his or her representative requests additional time to prepare materials beyond the time when the district director expects to conduct the records review, such a request will constitute a waiver of the requirement that the review occur prior to the expiration of the removal period.

(3) *Factors for consideration.* The district director's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the district director must be able to reach the conclusions set forth in paragraph (e) of this section.

(4) *District director's decision.* The district director will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(5) *District office staff.* The district director may delegate the authority to conduct the custody review, develop recommendations, or render the custody or release decision to those persons directly responsible for detention within his or her district. This includes the deputy district director, the assistant director for detention and deportation, the officer-in-charge of a detention center, persons acting in such capacities, or such other persons as the district director may designate from the professional staff of the Service.

(i) *Determinations by the Executive Associate Commissioner.* Determinations by the Executive Associate Commissioner to release or retain custody of aliens shall be developed in accordance with the following procedures.

(1) *Review panels.* The HQPDU Director shall designate a panel or panels to make recommendations to the Executive Associate Commissioner. A Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All

recommendations by the two-member Review Panel shall be unanimous. If the vote of the two-member Review Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Review Panel member is added. The third member of any Review Panel shall be the Director of the HQPDU or his or her designee. A recommendation by a three-member Review Panel shall be by majority vote.

(2) *Records review.* Initially, and at the beginning of each subsequent review, the HQPDU Director or a Review Panel shall review the alien's records. Upon completion of this records review, the HQPDU Director or the Review Panel may issue a written recommendation that the alien be released and reasons therefore.

(3) *Personal interview.* (i) If the HQPDU Director does not accept a panel's recommendation to grant release after a records review, or if the alien is not recommended for release, a Review Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the HQPDU Director. The HQPDU Director will provide a translator if he or she determines that such assistance is appropriate.

(ii) The alien may be accompanied during the interview by a person of his or her choice, subject to reasonable security concerns at the institution's and panel's discretion, who is able to attend at the time of the scheduled interview. Such assistance shall be at no expense to the Government. The alien may submit to the Review Panel any information, in English, that he or she believes presents a basis for his or her release.

(4) *Alien's participation.* Every alien shall respond to questions or provide other information when requested to do so by Service officials for the purpose of carrying out the provisions of this section.

(5) *Panel recommendation.* Following completion of the interview and its deliberations, the Review Panel shall issue a written recommendation that the alien be released or remain in custody pending removal or further review. This written recommendation shall include a brief statement of the factors that the Review Panel deems material to its recommendation.

(6) *Determination.* The Executive Associate Commissioner shall consider the recommendation and appropriate custody review materials and issue a custody determination, in the exercise of discretion under the standards of this section. The Executive Associate Commissioner's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the Executive Associate Commissioner must be able to reach the conclusions set forth in paragraph (e) of this section. The Executive Associate Commissioner is not bound by the panel's recommendation.

(j) *Conditions of release.*—(1) *In general.* The district director or Executive Associate Commissioner shall impose such conditions or special conditions on release as the Service considers appropriate in an individual case or cases, including but not limited to the conditions of release noted in 8 CFR 212.5(c) and § 241.5. An alien released under this section must abide by the release conditions specified by the Service in relation to his or her release or sponsorship.

(2) *Sponsorship.* The district director or Executive Associate Commissioner may, in the exercise of discretion, condition release on placement with a close relative who agrees to act as a sponsor, such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States, or may condition release on the alien's placement or participation in an approved halfway house, mental health project, or community project when, in the opinion of the Service, such condition is warranted. No detainee may be released until sponsorship, housing, or other placement has been found for the detainee, if ordered, including but not limited to, evidence of financial support.

(3) *Employment authorization.* The district director and Executive Associate Commissioner may, in the exercise of discretion, grant employment authorization under the same conditions set forth in § 241.5(c) for aliens released under an order of supervision.

(4) *Withdrawal of release approval.* The district director or Executive Associate Commissioner may, in the exercise of discretion, withdraw approval for release of any detained alien prior to release when, in the decision-maker's opinion, the conduct of the detainee, or any other circumstance, indicates that release would no longer be appropriate.

(k) *Timing of reviews.* The timing of reviews shall be in accordance with the following guidelines:

(1) *District director.* (i) Prior to the expiration of the 90-day removal period, the district director shall conduct a custody review for an alien described in paragraphs (a) and (b)(1) of this section where the

alien's removal, while proper, cannot be accomplished during the 90-day period because no country currently will accept the alien, or removal of the alien prior to expiration of the removal period is impracticable or contrary to the public interest. As provided in paragraph (h)(4) of this section, the district director will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(ii) When release is denied pending the alien's removal, the district director in his or her discretion may retain responsibility for custody determinations for up to three months after expiration of the 90-day removal period, during which time the district director may conduct such additional review of the case as he or she deems appropriate. The district director may release the alien if he or she is not removed within the three-month period following the expiration of the 90-day removal period, in accordance with paragraphs (e), (f), and (j) of this section, or the district director may refer the alien to the HQPDU for further custody review.

(2) *HQPDU reviews.* (i) *District director referral for further review.* When the district director refers a case to the HQPDU for further review, as provided in paragraph (c)(2) of this section, authority over the custody determination transfers to the Executive Associate Commissioner, according to procedures established by the HQPDU. The Service will provide the alien with approximately 30 days notice of this further review, which will ordinarily be conducted by

the expiration of the removal period or as soon thereafter as practicable.

(ii) *District director retains jurisdiction.* When the district director has advised the alien at the 90-day review as provided in paragraph (h)(4) of this section that he or she will remain in custody pending removal or further custody review, and the alien is not removed within three months of the district director's decision, authority over the custody determination transfers from the district director to the Executive Associate Commissioner. The initial HQPDU review will ordinarily be conducted at the expiration of the three-month period after the 90-day review or as soon thereafter as practicable. The Service will provide the alien with approximately 30 days notice of that review.

(iii) *Continued detention cases.* A subsequent review shall ordinarily be commenced for any detainee within approximately one year of a decision by the Executive Associate Commissioner declining to grant release. Not more than once every three months in the interim between annual reviews, the alien may submit a written request to the HQPDU for release consideration based on a proper showing of a material change in circumstances since the last annual review. The HQPDU shall respond to the alien's request in writing within approximately 90 days.

(iv) *Review scheduling.* Reviews will be conducted within the time periods specified in paragraphs (k)(1)(i), (k)(2)(i), (k)(2)(ii), and (k)(2)(iii) of this section or as soon as possible thereafter, allowing for any unforeseen circumstances or emergent situation.

(v) *Discretionary reviews.* The HQPDU Director, in his or her discretion, may schedule a review of a detainee at shorter intervals when he or she deems such review to be warranted.

(3) *Postponement of review.* In the case of an alien who is in the custody of the Service, the district director or the HQPDU Director may, in his or her discretion, suspend or postpone the custody review process if such detainee's prompt removal is practicable and proper, or for other good cause. The decision and reasons for the delay shall be documented in the alien's custody review file or A file, as appropriate. Reasonable care will be exercised to ensure that the alien's case is reviewed once the reason for delay is remedied or if the alien is not removed from the United States as anticipated at the time review was suspended or postponed.

(4) *Transition provisions.* (i) The provisions of this section apply to cases that have already received the 90-day review. If the alien's last review under the procedures set out in the Executive Associate Commissioner memoranda entitled *Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable*, February 3, 1999; *Supplemental Detention Procedures*, April 30, 1999; *Interim Changes and Instructions for Conduct of Post-order Custody Reviews*, August 6, 1999; *Review of Long-term Detainees*, October 22, 1999, was a records review and the alien remains in custody, the HQPDU will conduct a custody review within six months of that review (Memoranda available at http://www.ins.usdoj.gov). If the alien's last review included an interview, the HQPDU review will be scheduled one year from the

last review. These reviews will be conducted pursuant to the procedures in paragraph (i) of this section, within the time periods specified in this paragraph or as soon as possible thereafter, allowing for resource limitations, unforeseen circumstances, or an emergent situation.

(ii) Any case pending before the Board on December 21, 2000 will be completed by the Board. If the Board affirms the district director's decision to continue the alien in detention, the next scheduled custody review will be conducted one year after the Board's decision in accordance with the procedures in paragraph (i) of this section.

(l) *Revocation of release*—(1) *Violation of conditions of release.* Any alien described in paragraph (a) or (b)(1) of this section who has been released under an order of supervision or other conditions of release who violates the conditions of release may be returned to custody. Any such alien who violates the conditions of an order of supervision is subject to the penalties described in section 243(b) of the Act. Upon revocation, the alien will be notified of the reasons for revocation of his or her release or parole. The alien will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification.

(2) *Determination by the Service.* The Executive Associate Commissioner shall have authority, in the exercise of discretion, to revoke release and return to Service custody an alien previously approved for release under the procedures in this section. A district director may also revoke release of an alien when, in the district director's opinion, revocation is in the public

interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner. Release may be revoked in the exercise of discretion when, in the opinion of the revoking official:

(i) The purposes of release have been served;

(ii) The alien violates any condition of release;

(iii) It is appropriate to enforce a removal order or to commence removal proceedings against an alien; or

(iv) The conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate.

(3) *Timing of review when release is revoked.* If the alien is not released from custody following the informal interview provided for in paragraph (l)(1) of this section, the HQPDU Director shall schedule the review process in the case of an alien whose previous release or parole from immigration custody pursuant to a decision of either the district director or the Executive Associate Commissioner under the procedures in this section has been or is subject to being revoked. The normal review process will commence with notification to the alien of a records review and scheduling of an interview, which will ordinarily be expected to occur within approximately three months after release is revoked. That custody review will include a final evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release. Thereafter, custody reviews will be conducted annually under the provisions of paragraphs (i), (j), and (k) of this section.

APPENDIX D

[EXHIBIT A]

[Seal omitted] U.S. Department of Justice
Immigration and Naturalization Service

HQCOU 90/16.51

Office of the Executive Associate Commissioner
425 I Street NW
Washington, DC 20536

[Filed: Feb. 3 1999]

MEMORANDUM FOR REGIONAL DIRECTORS

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Detention Procedures for Aliens Whose Immediate Repatriation
Is Not Possible or Practicable

This memorandum clarifies the authority of District Directors to make release decisions and emphasizes the need to provide a review of administratively final order detention cases both before and after the expiration of the mandatory 90 day detention period at § 241(a)(2) of the Immigration and Nationality Act (INA).

The District Director is required to review every administratively final order removal case before the ninety [90] day removal period mandated by § 241(a)(1) expires. 8 C.F.R. § 241.4 gives the District Director the authority to make release decisions beyond the removal period based on specific criteria in the regulation as set forth below. The regulation also provides that the Dis-

trict Director should provide an alien with the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order. The alien may be given this opportunity in writing, orally, or a combination thereof. The District Director must ensure that the file is documented with respect to the alien's opportunity to present factors in support of his release, and the reasons for the custody or release decision.

The District Director cannot delegate the authority to render the ultimate custody or release decision beyond those directly responsible for detention within his district or Service Processing Center (SPC). Such individuals may include the Deputy District Director, the Assistant Director for Detention, the Officer in Charge (OIC) of a detention center, or persons acting in such capacities. These persons must be specifically designated by the District Director.

Although the District Director cannot relinquish his decision-making authority, he may utilize various methods to assist in reaching a determination. For example, he may designate an individual or group of individuals to review the alien file and obtain any other relevant information. To the extent Districts have a high volume of post order cases, the District Director may also request detail assistance from other districts, the region and/or headquarters for the purpose of conducting custody reviews. The District Director may use information obtained by local staff or detailees to make his custody decision. Detail assistance may be coordinated through John Castro, at Headquarters Detention and Deportation, (202) 616-7836.

Every six months, the District Director must review the status of aliens detained beyond the removal period to determine whether there has been a change in circumstances that would support a release decision since the 90 day review. Further, the District Director should continue to make every effort to effect the alien's removal both before and after the expiration of the removal period. The file should document these efforts as well.

When an alien is released pursuant to 8 C.F.R. § 241.4 under an order of supervision, the order of supervision must specify the applicable conditions of supervision. In addition, the order of supervision must be signed by one of the parties authorized in 8 C.F.R. § 241.5.

Any alien described in 8 C.F.R. § 241.4(a), may be returned to custody subsequent to release under an order of supervision if such alien violates any of the conditions of the order of supervision. Any alien described in 8 C.F.R. § 241.4(b) who violates the conditions of the order of supervision is subject to the penalties described in § 243(b) of the INA.

District Directors are advised that a detention review is subject to the provisions of 8 C.F.R. § 236.1(d)(2)(ii) if the alien submits a written request to have his detention status reviewed by the District Director. Under 8 C.F.R. § 236.1(d)(2)(iii), the alien may appeal the District Director's Decision to the Board of Immigration Appeals. Where the alien has not made a written request to have his custody status reviewed, however, there is no provision for appeal of the District Director's decision to the Board of Immigration Appeals. *See* 8 C.F.R. § 241.4.

8 C.F.R. § 241.4 Continued detention beyond the removal period.

(a) Continuation of custody for inadmissible or criminal aliens. The district director may continue in custody any alien inadmissible under § 212(a) of the Act or removable under § 237(a)(1)(C), 237(a)(1)(C), 237(a)(2), or 237(a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:

(1) The nature and seriousness of the alien's criminal convictions;

(2) Other criminal history;

(3) Sentence(s) imposed and time actually served;

(4) History of failures to appear for court (defaults);

(5) Probation history;

(6) Disciplinary problems while incarcerated;

(7) Evidence of rehabilitative effort or recidivism;

(8) Equities in the United States; and

(9) Prior immigration violations and history.

(b) Continuation of custody for other aliens. Any alien removable under any section of the Act other than § 212(a), 237(a)(1)(C), 237(a)(2), or 237(a)(4) may be detained beyond the removal period, in the discretion of the district director, unless the alien demonstrates to the satisfaction of the district director that he or she is likely to comply with the removal order and is not a risk to the community.

Note: these instructions also apply to criminal alien deportation cases under former INA § 242 where the aliens are subject to required detention under current INA § 236(c). *See* October 7, 1998 memorandum entitled *INS Detention Use Policy*.

APPENDIX E

[Seal omitted] U.S. Department of Justice
Immigration and Naturalization Service

HQOPS 50/14.6-C

Office of the Executive Associate Commissioner
425 I Street NW
Washington, DC 20536

[Filed: Aug. 6 1999]

MEMORANDUM FOR ALL REGIONAL DIRECTORS
DISTRICT DIRECTORS
OFFICE OF FIELD OPERATIONS

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Interim Changes and Instructions for Conduct of Post-order Custody Reviews

This memorandum addresses several changes to current procedures regarding post-order detention procedures for aliens whose immediate repatriation is not possible or practicable.[1] Current regulations, 8 C.F.R. § 241.4, provide that the decision whether to detain or

[1] See the memoranda from Michael Pearson, Executive Associate Commissioner for Field Operations, February 3, 1999: *Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable* and April 30, 1999: *Supplemental Detention Procedures.*

release such an alien is made by the District Director. In the near future, the Service will begin the rulemaking process to propose a program modeled after the Cuban Review Plan of 8 CFR section 212.12 to address post-order custody cases. The custody of Mariel Cubans will continue to be governed by 8 CFR 212.12. Until this more permanent program is implemented, several changes are being made to the current procedures set forth in the memoranda of February 3, and April 30, 1999. These changes are effective immediately. All offices will follow identical procedures in conducting reviews of post-order custody cases, using the forms listed at the conclusion of this memorandum. The forms will be distributed to all offices.

The Attorney General and the Commissioner have agreed that these procedures, as detailed below under the heading "Interim Procedures," will include written notice to the alien of custody reviews. The notice will advise the alien that he may present information supporting a release, and he may be assisted by an attorney or other person at no expense to the government. The alien will receive an in-person interview at the first custody review following expiration of the removal period. Thereafter, the alien will receive a separate notice of the opportunity for an annual interview. The alien will be provided written reasons for INS custody decisions.

The District Director will continue to make custody determinations within the ninety-day removal period under the memoranda of February 3, and April 30, 1999. The next scheduled review shall be nine months from the date of the final administrative order of removal or six months after the last review, whichever is

later. That review will include an interview and is subject to review at INS Headquarters if the District Director has determined that the alien should remain in custody. Thereafter, reviews will be conducted at six-month intervals, alternating between a file review by the District Director (without an interview unless the District Director, in his discretion, determines that one would be useful, and without Headquarters review), and a review with the opportunity for an interview at the alien's request and with Headquarters review.

No case subject to Headquarters review will be considered a final custody decision until the District level decision has been ratified through the Headquarters review or resolved after referral back to the District. If the Headquarters reviewer concludes that the District Director should reconsider his decision or that further documentation is required to support the District Director's decision, the case shall be forwarded to the Regional Office with a cover memorandum and instructions to refer the case back to the District for further consideration or documentation. The Headquarters reviewer shall detail the issues that resulted in the referral and forward the case to the Regional Office.

Regional Directors are responsible for working with the District Director to comply with the Headquarters instructions on referrals. In addition, the Regional Director is responsible for preparation of statistics on the custody reviews conducted in each district.

INTERIM PROCEDURES

(1) Pursuant to the provisions of 8 C.F.R. § 241.4, the District Director will continue to conduct a custody review of administratively final order

removal cases *before* the ninety-day removal period mandated by § 241(a)(1) expires for aliens whose departure cannot be effected within the removal period.

(2) These procedures apply to any alien ordered removed who is inadmissible under § 212, removable under 237(a)(1)(C), 237(a)(2), or 237(a)(4) or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal. They cover aliens convicted of an aggravated felony offense who are subject to the provisions of old INA § 236(e)(1)-(3), and non-aggravated felon aliens with final orders of exclusion. Mariel Cubans are excluded from these procedures as parole reviews for them are governed by 8 C.F.R. § 212.12. The ninety-day review will be conducted pursuant to the instructions set out in the memoranda of February 3 and April 30, 1999. District Directors may, in their discretion, interview the alien if they believe that an interview would facilitate the custody review.

(3) Following expiration of the ninety-day removal period, the next scheduled review provided by the District Director shall be nine months from the date of the final administrative order of removal or six months after the last review, whichever is later. Written notice shall be given to each alien at least 30 days prior to the date of the review. The notice will be provided either by personal service or certified mail/return receipt. The notice shall specify the factors to be considered and explain that the alien will be pro-

vided the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order.

(4) For the review discussed in paragraph 3 above, an interview is mandatory and the District Director's preliminary decision will be subject to Headquarters review. Thereafter, custody reviews will be conducted every six months, alternating between District Director file reviews and a review that includes the opportunity for an interview at the alien's request and a Headquarters review of detention decisions. A separate notice will advise the alien of the opportunity for the interview. The alien may check the appropriate box on the notice, returning the form provided within 14 calendar days so that an interview may be scheduled. The District Director has the discretion to schedule further interviews if he determines they would assist him in reaching a custody determination.

(5) The alien must be advised that he may submit any information relevant to support his request for release from detention, either in writing, electronically, by U.S. mail (or any combination thereof), or in person if an interview is conducted. The alien must also be advised that he may be represented by an attorney, or other person at no expense to the government. If an interview has been scheduled, the alien's representative may attend the review at the scheduled time.

(6) The District Director may delegate custody decisions to the level of the Assistant District Director, Deputy Assistant District Director, or those acting in their capacity. Custody determinations will be made by weighing favorable and adverse factors to determine whether the detainee has demonstrated by clear and convincing evidence that he does not pose a threat to the community, and is likely to comply with the removal order. *See* 8 C.F.R. § 241.4. The alien's past failure to cooperate in obtaining a travel document *shall* be considered an adverse factor in determining eligibility for release. *See* INA § 241(a)(1)(C) Suspension of Period. The fact that the alien has a criminal history does not create a presumption in favor of continued detention.

(7) Within thirty days of the District Director's custody review, the alien must receive written notification of a custody decision. All notification will be provided either by personal service or certified mail/return receipt. A decision to release should specify the conditions of release. A decision to detain will clearly delineate the factors presented by the alien in support of his release, and the reasons for the District Director's decision.

(8) With respect to those detain decisions that are subject to Headquarters review under paragraph 4, the District Director's determination that the alien should be detained is to be regarded as only preliminary. In those instances, the Regional Directors will forward the pre-

liminary detain decisions to Headquarters for review. Headquarters review will be conducted by Operations and Programs representatives (with assistance from the Office of General Counsel as necessary). Where the Headquarters reviewer's decision concurs with the District Director's, the Headquarters reviewer will write a supporting statement and will seek concurrence from a second Headquarters reviewer. Where the two reviewers differ, a panel of three Headquarters reviewers will conduct a further review of the case. The Headquarters panel may ratify the District Director's decision, return the case to the District Director to reconsider his decision, or determine that additional information is required to make a decision. The Headquarters review must be completed within thirty days of file receipt. The Headquarters review conclusions will be forwarded to the Regional Director for distribution to and appropriate action by the District Director.

(9) The District Director will review his decision in light of the Headquarters recommendations and will notify the alien of the final custody determination within thirty days of completion of the Headquarters review.

(10) The District Director should make every effort to effect the alien's removal both before and after expiration of the removal period. All steps to secure travel documents must be fully documented in the alien's file. However, if the District Director is unable to secure travel documents locally after making diligent efforts to do

so, then the case shall be referred to Headquarters OPS/DDP for assistance. More detailed instructions will be issued from the Executive Associate Commissioner for Operations by separate memorandum.

(11) On August 30, 1999, and on the last workday of each quarter (September, December, March, June) each district shall submit a custody review status report to its Regional office and to Headquarters. There will be more detailed instructions issued on reporting procedures at a later time.

FORMS [to be distributed]

(a) Notice to Alien
(b) Notice of Interview
(c) Detained Alien Custody Review Worksheet
(d) Decision of Custody Review
(e) Decision to Continue Detention
(f) Decision to Release
(g) Custody Review Status Report

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In The

Supreme Court of the United States

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN and
IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

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I. MR. ZADVYDAS'S DETENTION IS EXCESSIVE BECAUSE HIS REMOVAL IS NOT REASONABLY FORESEEABLE.

This case is not about the decision whether to deport. Nor is it about how to bring about deportation. It does not concern detention pending deportation, incident to deportation or to effectuate deportation. It is about detention when deportation is not a realistic possibility.

The government does not address that question. Rather, it misframes the issue as whether detention is permissible to facilitate deportation. But that presumes that deportation is reasonably foreseeable, which it is not in Mr. Zadvydas's case. The government repeatedly buries the unlikelihood of deporting petitioner. It asks whether substantive due process prohibits detention where the alien "has not yet been removed." Respondent's Brief (Resp. Br.) at 16, 19. It inaccurately describes the detention under challenge as removal that "cannot be effectuated immediately," Resp. Br. at 21, or detention "in connection with . . . removal." Resp. Br. at 20. Most incredibly, it relies heavily on case law about detention *prior* to entry of a deportation order, during a finite period of time when no attempt to deport has yet occurred. *See* Resp. Br. at 23, 30-31 discussing ***Carlson v. Landon***, 342 U.S. 524 (1952). That is not what this case is about.

This case is about prolonged detention with no end in sight. But for the district court's grant of habeas relief, Mr. Zadvydas would have been incarcerated longer than six years. The best that the government can say about the future prospects of deporting Mr. Zadvydas is that "it

cannot 'now be said with any real assurance' that petitioner 'will never be deported.' " Resp. Br. at 47 (quoting Circuit Court, J.A. 212). It makes no concrete showing of any reasonably foreseeable prospects because none exist. Mr. Zadvydas is stateless. The only two countries that would possibly have granted him entry have refused him. Germany refused to admit him in 1995.[1] (J.A. 33-34). Lithuania refused to admit him in 1994, and has continued to reject his documentation as insufficient to grant him citizenship. (J.A. 23 & 168-169) The only remaining possibilities consist of speculative hypotheticals posed by the circuit court, which the court itself characterized as "problematical, difficult and distant" (J.A. 219), and which the INS, in the exercise of its expertise, did not find worthy of pursuit in the five years preceding the court's opinion or since. In truth, after six years, the INS has no real leads. To say that detention under these circumstances is to "effectuate deportation" is fanciful at best.

When departure is not reasonably foreseeable, the government interest in deportation is too attenuated to justify the draconian abridgement of liberty posed by potentially lifelong incarceration, particularly when less restrictive alternatives are available. The implementing regulations provide that detention continues until the deportee proves to the INS that he is no longer dangerous in light of his prior offenses, a fact that will never change.

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[1] The government conceded that in 1994 the German Consulate had determined the petitioner is not a German citizen. Resp. Br. at 7, citing J.A. 74, 113, and that both of his parents are Lithuanian. *Id.* at 7, n.4 citing J.A. 75, 194-95.

8 C.F.R. §§ 241.4(d)(1) & (e). That is a grossly excessive method of protecting the community against potential danger and flight risk.

II. THE MERE FACT THAT THIS CASE INVOLVES NON-CITIZENS DOES NOT REQUIRE THIS COURT TO DEFER TO THE INS.

This case is not about the decision whether to exclude or expel. Nor, given the remote prospects for departure, is it about detention as a means to ensure deportation. In these circumstances, "judicial deference loses its rationale altogether." ***Rosales-Garcia v. Holland***, 2001 WL 87442 at *18 (6th Cir. (Ky.)) (Jan. 31, 2001).

The plenary power doctrine has its greatest force with respect to decisions about whom to admit into the United States and whom to expel. Courts will not interfere with congressional decisions about the substantive grounds for deportation. ***Galvan v. Press***, 347 U.S. 522, 530-31 (1954). The government nevertheless would sweep all matters involving immigrants under its plenary authority. Resp. Br. at 20. However, the cases on which it relies, ***Fiallo v. Bell***, 430 U.S. 787 (1977), and ***Harisiades v. Shaughnessy***, 342 U.S. 580 (1952), do not support such a broad proposition. These concern substantive decisions about qualifications for admissions and grounds for deportation, respectively.

Outside that context, this Court has carefully scrutinized infringements of the constitutional rights of immigrant residents. In ***Wong Wing v. United States***, 163 U.S. 228 (1896), it invalidated an immigration statute that provided for punitive detention of aliens ordered

deported without judicial process; in ***United States v. Witkovich***, 353 U.S. 194 (1957), it narrowed an immigration reporting statute to avoid abridgement of constitutional rights; and in ***Landon v. Plasencia***, 459 U.S. 21 (1982), it imposed procedural protections on exclusion proceedings against a resident alien.[2]

Mr. Zadvydas does not challenge his deportation order. His case does not involve detention as a means to effectuate deportation because the possibility of deportation is remote. The INS would detain Mr. Zadvydas to prevent him from committing future crimes. That interest does not implicate national sovereignty, nor is it an area in which the INS has particular responsibility or expertise. Therefore, the decision to detain Mr. Zadvydas to prevent recidivism is not entitled to deference.

Amongst a plethora of generalities, the government puts forth no concrete sovereignty concerns in this case. It purports to find a sovereignty interest in not allowing a recalcitrant foreign country to shift responsibility for its citizens onto the United States. Resp. Br. at 21. This justification has absolutely no applicability to Mr. Zadvydas. He is not a citizen of any country. No foreign country is reneging on its responsibility to accept him, nor is any nation forcing the United States to keep him in our midst. To the contrary, the United States voluntarily admitted Mr. Zadvydas in 1956. He grew up here from the age of 8 years old. If he is a product of any society, it is ours. If any country has "responsibility" for him, it is the United States. Indeed, as a factual matter, detention of

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[2] *See also* ***INS v. Chadha***, 462 U.S. 919, 940-41 (1983).

a long-term resident would have little deterrent effect on another country's emigration policy. Even if it did, this Court held in ***Wong Wing*** that otherwise unconstitutional detention is not saved by its peripheral impact in furtherance of legitimate immigration policy. 163 U.S. at 237. This Court did not hesitate in limiting *how* Congress implements its immigration policies. Brief of the American Civil Liberties Union as *Amici Curiae* (ACLU Amicus) at 28 & 28 n.1.

Even if Mr. Zadvydas's release from detention could be construed as having some kind of foreign policy implications, this would not require deference. This Court has never held that the mere existence of potential foreign policy concerns immunizes governmental action from judicial review. *See* page 20 of the Brief of Law Professors as *Amici Curiae* (Law Professor Amicus) in ***Ma v. Reno***, 208 F.3d 815, reh'g denied, (9th Cir. 2000), cert. granted, 121 S.Ct. 297 (2000), citing ***Baker v. Carr***, 369 U.S. 186, 211 (1962).

The government hypothesizes that a foreign country may infiltrate a terrorist into the United States, refusing to take him back when he is ordered deported. Resp. Br. at 21. Terrorism poses a qualitatively different type of danger than the domestic criminal activity for which Mr. Zadvydas was ordered deported. Indeed, as part of Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 309-546 (IIRIRA), Congress enacted special provisions governing the detention and removal of "alien terrorists." *See* 8 U.S.C. §§ 1531-1537. Preventive detention of persons ordered deported under 8 U.S.C. §§ 1531-1537 due to security and related grounds is not before the Court

today.[3] What is before the Court is preventive detention of persons like Mr. Zadvydas who are ordered deported under 8 U.S.C. § 1227(a)(2) because of prior criminal offenses.[4] That is simply a matter of domestic crime control, a matter in which the INS has *no* particular expertise, and hence is subject to full judicial review.

III. DETENTION WHEN DEPORTATION IS NOT REASONABLY FORESEEABLE VIOLATES SUBSTANTIVE DUE PROCESS.

To determine whether imprisonment has become excessive to its regulatory purpose and hence punitive, this Court must balance the individual's fundamental liberty interest in freedom from physical restraint with the governmental interest in detention. The balancing test requires consideration of the length of detention, the likelihood of effectuating deportation, the risk of dangerousness and flight, and the availability of less restrictive

[3] That 8 U.S.C. § 1537(b)(2)(C) contains express authority for detention of alien terrorists whose countries will not take them back is further evidence that Congress did not intend to authorize indefinite detention of non-removables in § 1231(a)(6) which contains no comparable language.

[4] Moreover, Mr. Zadvydas has already served his sentence and been released by the criminal justice system. *Cf.* ***Foucha v. Louisiana***, 504 U.S. 71, 82 (1992) (noting that society's "normal means of dealing with persistent criminal conduct" is sufficient to address threat of future danger in lieu of indefinite commitment.)

alternatives. When deportation is not reasonably foreseeable, the balance favors an alternative less restrictive than detention, such as supervised release.[5]

A. Neither *Mezei* nor *Carlson* concerned detention of a resident after entry of a deportation order.

This Court has never allowed the political branches to imprison long-time residents for prolonged and indeterminate periods due to the government's inability to implement a deportation order. The INS relies on cases that are plainly inapposite. ***Shaughnessy v. United States ex rel. Mezei***, 345 U.S. 206 (1953), concerns detention of a would-be entrant who was refused admission because of national security. Although he previously lived in the United States, Mr. Mezei abandoned his residence, spent 19 months behind the Iron Curtain and re-applied for entry as a new immigrant. Because he was an entrant rather than a resident, the Court denied him the constitutional protections afforded residents. By contrast, Mr. Zadvydas never left the United States since he was lawfully admitted in 1956. His deportation order is based on

[5] Moreover, recognition of that conclusion does *not*, as asserted by the Washington Legal Foundation amicus brief, result in the wholesale automatic release of dangerous aliens. Instead, it requires a case-by-case analysis of the particular individual's present danger to the community and flight risk, balanced against length of detention and foreseeability of removal. Consideration of less restrictive means also should be weighed to determine if such means adequately address the government's interests. *Compare* 8 U.S.C. § 1253(a)(3) (providing analogous balancing test prior to imposition of punishment for an alien's wilful failure to comply with an order of removal.)

criminal convictions devoid of national security implications. There is no basis for extending *Mezei* to these facts.[6]

Carlson v. Landon, 342 U.S. 524 (1952), the other case heavily relied on by the government, concerns detention during deportation proceedings, before entry of an order. Unlike the detention at issue here, which has no determinate end-date and potentially could continue for a lifetime, the detention in *Carlson* was for a finite period. "It should be noted," the *Carlson* Court said, "that the problem of habeas corpus after unusual delay in deportation hearings is not involved in this case." 324 U.S. at 546.[7] Further, as in *Mezei*, detention was premised on a national security threat. By contrast here, Mr. Zadvydas faces potentially lifelong incarceration for reasons totally unrelated to national security.

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[6] Moreover, as the Sixth Circuit recently noted in finding that indefinite detention of an excludable alien violated substantive due process, "*Mezei* has been severely criticized for establishing a preposterous level of deference to Congress' authorization of due process procedures for aliens." *Rosales-Garcia v. Holland*, 2001 WL 87442 at *13 n.25 (6th Cir. (Ky.)) (Jan. 31, 2001), citing, Henry Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harv.L.Rev. 1362, 1392 (1953).

[7] *See also* *United States v. Witkovich*, 353 U.S. 194, 201 (1957) noting that *Carlson* involved a customarily brief detention pending a hearing.

B. Even after entry of a deportation order, this Court has protected a resident alien's constitutional rights.

Unlike the cases invoked by the government, *Wong Wing* and *Witkovich* involved constitutional challenges by residents to INS restrictions after entry of a deportation order. In *Wong Wing*, this Court distinguished between temporary detention for the purpose of effectuating deportation, which it approved, and imprisonment as punishment, which it invalidated in the absence of judicial process. The Court held that the Constitution did not permit the latter, even for an alien under a final order of deportation.

Like the instant case, *United States v. Witkovich*, 353 U.S. 194 (1957), involved a constitutional challenge to INS restrictions imposed when the agency was unable to effectuate deportation. This Court found the restrictions constitutionally suspect, despite the INS's contention that they were necessary to prevent a continued threat to national security.

Six months after Mr. Witkovich was ordered deported because of Communist activities, the INS was still unable to arrange for his departure. Accordingly, it released him subject to supervision. As a condition of supervision, the statute required a deportee to provide information "as to his nationality, circumstances, habits, associations, and activities." *Id.* at 195 (quoting 8 U.S.C. § 1252(d)). Purportedly pursuant to the statute, the INS asked Mr. Witkovitch questions about ongoing Communist relationships. Mr. Witkovich refused to answer, and

the INS charged him with failing to comply with conditions of supervision. Mr. Witkovich moved to dismiss the indictment on the grounds that the statute was unconstitutional.

The INS argued that it should be allowed to inquire about continuing Communist affiliations to prevent recurrence of the very activity for which Witkovich had been ordered deported. ***Id.*** at 198. This Court held that the government's view of the statute raised doubts about its constitutionality.

> By construing the Act to confer power on the Attorney General and his agents to inquire into matters that go beyond assuring an alien's availability for deportation, we would, at the very least, open up the question of the extent to which an administrative officer may inhibit deportable aliens from renewing activities that subjected them to deportation . . . [S]upervision of the undeportable alien may be a lifetime problem. In these circumstances, issues touching liberties that the Constitution safeguards; even for an alien "person," would fairly be raised on the Government's view of the statute.

Id. at 201. To avoid the constitutional problem, the Court limited the statute to authorize only those questions "reasonably calculated" to provide information relevant to availability for departure. ***Id.*** at 202.[8]

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[8] As argued in petitioner's original brief, this Court should similarly avoid the constitutional problem presented by this case by construing § 1231(a)(6) to authorize detention for only a reasonable time to effectuate removal, a period that has already been surpassed in Mr. Zadvydas's case. The government

Witkovich stands for the proposition that the government interest in prevention of danger does not give it *carte blanche* to abridge an alien's constitutional rights, even after entry of a deportation order. In that case, the Court found that questioning about political activities was constitutionally suspect. *A fortiori*, the prolonged and indefinite incarceration at issue here triggers constitutional concerns.

C. This Court restricts detention based on future dangerousness to limited situations not present here.

The strict constitutional limitations on preventive detention force the government to rely on cases that carve out carefully circumscribed exceptions. None of the exceptions approved by this Court, however, involved the kind of prolonged, indeterminate detention scheme at issue here. *See* ACLU Amicus in ***Ma v. Reno***, distinguishing INS's detention scheme from other civil detention

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addressed that argument in its brief in ***Ma v. Reno***, 208 F.3d 815, reh'g denied, (9th Cir. 2000), cert. granted, 121 S.Ct. 297 (2000), as did the respondent in that case. Petitioner would adopt by reference respondent's argument in ***Ma*** on this issue. Washington Legal Foundation Amicus Brief at p.20 suggests petitioner has not properly raised this question. As urged in petitioner's Reply Brief in Support of Petition for Writ of Certiorari, this issue is properly before this Court. Review before this Court brings not just the constitutional questions decided below, but the entire case. ***Zobrest v. Catalina Foothills School District***, 509 U.S. 1, 7 (1993). Petitioner raised the statutory question in his supplemental brief in the circuit court. This question is therefore part of Mr. Zadvydas's original petition. ***Caspari v. Bohlen***, 510 U.S. 383, 389-90 (1994).

schemes this Court upheld. This Court approved indeterminate detention of sexual offenders in ***Kansas v. Hendricks***, 521 U.S. 346 (1997), because the statute limited detention to only those persons proven to have a mental abnormality rendering them unable to control their dangerousness. The Court properly recognized that other dangerous persons were more properly dealt with through the criminal process. ***Id***. at 360. By contrast, Mr. Zadvydas certainly suffers from no mental impairment rendering him unable to control his conduct. Indeed, a psychiatrist found him not to be dangerous. (J.A. 148-49). The fact that he is subject to a deportation order does not heighten his dangerousness.

Likewise in ***United States v. Salerno***, 481 U.S. 739 (1987), this Court recognized the general rule that "the government may not detain a person prior to a judgment of guilt in a criminal trial." ***Id***. at 748. It allowed an exception, however, for preventive detention pending trial only because of statutory safeguards not present in IIRIRA. Preventive detention was limited to only the most serious of crimes, and the defendant was entitled to a prompt detention hearing at which the government was required to convince a neutral, judicial officer by clear and convincing evidence that no conditions of release could protect the community. Moreover, detention was "limited by the stringent time limitations of the Speedy Trial Act." ***Id***. at 747, 749.

By contrast here, detention is not limited to a small group of the most dangerous criminals. Persons convicted of any crime of moral turpitude, indeed, persons who have not been convicted of a crime but whom the

INS deems dangerous, are subject to incarceration. Further, the INS is both prosecutor and judge, 8 C.F.R. § 241.4(c); the burden of proof is placed on the resident alien to show he is not dangerous, 8 C.F.R. § 241.4(d)(1). Detention is potentially life-long if the resident fails to carry his burden of proof.

The INS scheme more closely resembles that invalidated by this Court in ***Foucha v. Louisiana***, 504 U.S. 71 (1992). ***Foucha*** involved a Louisiana statute permitting indefinite civil detention of an insanity acquitee who failed to prove lack of dangerousness, even if he was no longer mentally ill. Disturbed by the placement of the burden of proof and lack of strict limitation on duration, the Court held that the statute did not come within the narrowly drawn *Salerno* exception. The INS scheme has the same infirmities.

IV. DEPORTATION DOES NOT RELEGATE MR. ZADVYDAS TO THE CONSTITUTIONAL STATUS OF AN EXCLUDABLE ALIEN.

The government asks this Court to take the extreme and unprecedented step of holding that the entry of a deportation order relegates long-time residents to the status of first-time entrants for the purpose of evaluating the constitutionality of indefinite detention. Resp. Brief at 20 & 35-37. This Court should not. The government's release of a deportee like Mr. Zadvydas does not raise the sovereignty issues posed by the release of an excludable. Moreover, while it is unclear if an excludable has any

constitutional rights,[9] this Court has recognized since 1896 that a deportee does, even after entry of a deportation order. *See* ***Wong Wing, supra***.

A. Unlike detention of an excludable, the government has no sovereignty interest in detaining a long-time resident ordered deported because of criminal conduct.

The government's sovereignty interest in detaining an excludable is not present in the detention of long-time resident under order of deportation.[10] The government invokes the specter of a foreign government forcing us to admit its citizens by sending them here and refusing to take them back. Resp. Br. at 36. The source of the argument is ***Mezei***, 345 U.S. at 216, a case about a new entrant with national security concerns. The argument has force only in that context. But that is not this case. Mr. Zadvydas is a long-time resident ordered deported because

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[9] *See* ***Ma v. Reno***, 208 F.3d 815, 824, reh'g denied, (9th Cir. 2000), cert.granted, 121 S.Ct. 297 (2000); *but see*, ***Rosales-Garcia v. Holland, supra*** (finding that excludables are constitutionally protected against indefinite detention).

[10] Furthermore, the government misrepresents the provisions of IIRIRA in suggesting that Congress eliminated the distinction between excludables and residents. To the contrary, like its predecessor, IIRIRA grants aliens who have been admitted more rights than those seeking entry. The statute preserves distinct grounds for exclusion and for deportation. 8 U.S.C. § 1229a(a)(2). Applicants for admission have a heavier burden of proof than do residents; also, unsuccessful applicants for admission have no choice as to the country to which they are returned, while deportees may select the country to which they will be removed. 8 U.S.C. § 1231(b).

of purely domestic criminal conduct. In the case of long-term residents, the nexus is attenuated. Other nations did not force legally admitted residents on us; the INS had the option of excluding them and decided not to exercise it. With passage of time, a resident's links with the foreign country become weaker and ties to the United States grow stronger. In cases like this, detention in default of deportation is a function of domestic crime control, not foreign policy.

The government's reliance on ***Fong Yue Ting v. United States***, 149 U.S. 698 (1893), Resp. Br. at 20 & 37-39, is misplaced. ***Fong*** holds only that the power to exclude and expel stems from one source, not that the government's interest is the same in each instance. This Court has repeatedly held that in effectuating deportation, the government is subject to constitutional constraints that do not apply in the case of excludables. Compare ***Yamataya v. Fisher***, 189 U.S. 86 (1903) and ***Plasencia, supra***, with ***United States ex rel. Knauff v. Shaughnessy***, 338 U.S. 537 (1950) and ***Mezei, supra***.

This difference is also reflected in the history of post-deportation detention statutes which always have treated deportables and excludables differently. *See* Resp. Br. in ***Ma*** at 36-39 and ***Mezei***, 345 U.S. at 216. The Court in ***Mezei*** notes that while Congress provided for resident aliens to be released on bond pending deportation, no similar statutory authority existed for excludable aliens. Although the current statute does not distinguish between post-final order detention for excludable and deportable aliens, this would not mean the government's interests are the same for the purpose of substantive due process analysis.

B. The fundamental liberty interest in freedom from physical restraint is not extinguished with entry of a deportation order.

The right at stake in this case is the core liberty interest in freedom from physical restraint. The government mischaracterizes it as "the right to be at large in this country," Resp. Br. at 36, thereby improperly distancing deportees from other residents. In fact, the liberty interest is the right to be free from physical restraint, a fundamental interest that exists regardless of the legality of presence within the country. *See e.g.* ***Plyler v. Doe***, 457 U.S. 202 (1982).

V. THE NEW INS REGULATION DOES NOT SOLVE THE SUBSTANTIVE DUE PROCESS PROBLEM.

Contrary to the government's representation, the new INS regulation does not cure the substantive due process problem. The new regulation allows indefinite detention on the basis of future dangerousness alone. Furthermore, it lacks the protections that characterized other civil detention schemes upheld by this Court. *See* ACLU Amicus. In particular, like the former regulation, it impermissibly places the burden on the detainee to prove that he is not dangerous.

A. The implementing regulation permits prolonged, indeterminate detention on the basis of future dangerousness alone.

The latest update of the implementing regulation does not solve the constitutional problems with the INS's

application of 8 U.S.C. § 1231(a)(6). It requires a finding that the detainee is not dangerous before he can be released. 8 C.F.R. § 241.4(e), at 65 Fed. Reg. 80281, 80295 (Dec. 21, 2000). The regulation also requires a finding that travel documents are not available, but even if that finding is made, release is not permissible without a finding of non-dangerousness as well. Thus, under the new regulation, future dangerousness by itself results in continued detention, even in the case of an alien who can *never* be removed.

The government is wrong in its assertion that the latest regulation incorporates consideration of length of detention and likelihood of departure. Resp. Brief at 45. The regulation lists seven specific factors for consideration in the release decision, none of which relates to length of detention or likelihood of departure. *See* 8 C.F.R. § 241.4(f), at 65 Fed. Reg. at 80295. The eighth and last factor incorporates five sub-factors. Again, none of these relates to length of detention or likelihood of departure. *Id.* Commentators suggested inclusion of these factors, but the INS rejected their suggestions. *Id.* at 80288.

The government relies on INS commentary to support its assertion that the regulation permits consideration of length of detention and likelihood of deportation. Resp. Br. at 45. The commentary states that the regulation *does not prevent* consideration of those factors. 65 Fed. Reg. at 80288. The regulation itself, however, gives no hint that its enumerated factors are nonexclusive. Furthermore, even if the regulation permitted consideration of length of detention and likelihood of detention, that would not mean that INS decision-makers in fact would consider them.

The government's representation that the latest regulation cures the substantive due process issues in this case is particularly disingenuous when the INS's commentary expressly adopts the position of the Fifth Circuit approving Mr. Zadvydas's continued detention.[11] ***Id.*** at 80283. The regulation authorizes continued detention, regardless of duration, with no determinate end, on the basis of future dangerousness alone. That is a violation of substantive due process, regardless of how frequently review takes place[12] or how much process is permitted.

B. The regulation improperly switches the burden of proof to the detainee to prove lack of dangerousness.

Amongst the serious defects in the regulatory process is its assignment of the burden to the detainee to prove that he is not dangerous. "In our society liberty is the norm, and detention prior to trial or without trial the carefully limited exception." ***Salerno***, 481 U.S. at 755. As

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[11] With equal disingenuousness, the government notes that Mr. Zadvydas never received the benefits of a full-fledged custody review because the district court granted habeas relief before the procedures were in place. Resp. Br. at 40 n.18. Implicit therein is the hint that the additional procedures may afford him relief. If that is so, then the INS should have reviewed his case before now. Indeed, Mr. Zadvydas so requested, but until this latest brief, the INS insisted that it could not grant Mr. Zadvydas a custody review unless he resubmitted himself to custody. Gov't's Supp. Br. to Fifth Cir. at 14-15. Its current offer of a custody review while he is at large is an about-face. Resp. Br. at 41 n.18.

[12] In fact, the new rule reduces the frequency of reviews from every six months to every year. 65 Fed.Reg. at 80289.

the proponent of detention, the INS should have the burden of proving justification for an exception to the general rule. ***Reno v. Flores***, 507 U.S. 292, 341 (1993)(Stevens, J., dissenting). The INS regulation, however, starts from the situation in which the deportee is detained under the mandatory provisions of 8 U.S.C. § 1231(a)(2) during the removal period, treats the condition of detention as the norm, and imposes the burden on the detainee to establish grounds for his release. 8 C.F.R. § 241.4(d)(1). That inversion of the burden of proof is extremely dangerous. From a constitutional perspective, mandatory detention during the removal period is an exception to the normal condition of liberty, and the INS has a heavy burden to establish why the exception should be extended.

CONCLUSION

For the foregoing reasons and for the reasons set forth in petitioner Kestutis Zadvydas's original Brief on the merits, petitioner respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fifth Circuit and reinstate the grant of a writ of habeas corpus by the District Court, ordering him released from detention.

Respectfully submitted,

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Dec 26, 2000

No. 99-7791

IN THE
Supreme Court of the United States

KESTUTIS ZADVYDAS,
Petitioner,

v.

LYNN UNDERDOWN and
IMMIGRATION AND NATURALIZATION SERVICE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Immigration and Naturalization Service's (INS) continued detention of a criminal alien who is subject to a final order of deportation but whose deportation cannot be effectuated immediately, violates substantive due process, where the alien's custody is reviewed automatically by the INS on a periodic basis to determine whether he would present a danger to society or a flight risk if released.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 99-7791

KESTUTIS ZADVYDAS,
Petitioner,

v.

LYNN UNDERDOWN and
IMMIGRATION AND NATURALIZATION SERVICE,
Respondents.

On Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center[1] with supporters in all 50

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed (continued...)

states. WLF devotes a substantial portion of its resources to promoting America's security. To that end, WLF has appeared before this Court and other federal courts to combat illegal immigration and to ensure that aliens who engage in criminal activities are excluded from American society. *See, e.g., Reno v. American-Arab Anti-Discrimination Committee,* 119 S. Ct. 936 (1999); *Ogbomon v. United States,* 519 U.S. 1073 (1997); *Immigration and Naturalization Service v. Elramly,* 518 U.S. 1051 (1996). WLF also filed a brief in support of the certiorari petition filed by the federal government in *Reno v. Ma*, No. 00-38, the case that has been consolidated with this case.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* before the Court on immigration-related issued on a number of occasions.

As a result of the district court's decision in this case, a criminal alien at this moment is walking freely on the nation's streets, despite having been convicted of serious felonies, despite being subject to a final order of deportation, and despite repeated INS determinations that he is a danger to the community. Moreover, as Respondents' brief notes, hundreds of other dangerous criminal aliens may also soon be foisted on the public as a result of the Ninth Circuit's decision in *Ma v. Reno,* 208 F.3d 815 (9th Cir. 2000), *certiorari granted*, ___

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[1](...continued)
monetarily to the preparation and submission of this brief.

U.S. ___, 69 U.S.L.W. 3257 (Oct. 10, 2000). *Amici* are filing an *amicus curiae* brief in this case because they fear for the public safety if the Fifth Circuit's decision is not allowed to stand.

Amici have long been involved in efforts to protect the general public from criminal activity and to promote the rights of those who fall victim to crime. The district court's decision and the Ninth Circuit's *Ma v. Reno* decision discuss at great length the alleged rights of convicted felons, but do not seem to have taken into account the rights of those who are threatened by Kestutis Zadvydas's and Kim Ho Ma's continued presence in American society.

Amici are filing this brief with the consent of all parties. Letters of consent have been lodged with the Court.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby adopt by reference the Statement contained in Respondents' brief.

In short, Petitioner Kestutis Zadvydas is a 52-year-old alien who has spent virtually his entire life either engaged in criminal activity or serving time in prisons as a result of his repeated criminal convictions.[2] Because of that criminal

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[2] Mr. Zadvydas's criminal career includes: (1) juvenile convictions for car theft in 1964 and trespass in 1965; (2) a six-year sentence in 1966 in New York for attempted robbery; (3) a 1973 conviction for auto theft; (4) a 1-1/2 to 3-year sentence in 1974 in New York for attempted burglary; (5) punishment for escaping from prison while serving the 1974 sentence; (6) his status from 1987 to 1992 as a
(continued...)

activity, he is subject to a final deportation order issued by the INS and has exhausted all appeals. Mr. Zadvydas has been unable to find a country willing to accept him. Accordingly, he argues that he has a substantive due process right to remain free in American society until such time as he can find another country willing to tolerate his presence.

The Respondent in No. 00-38, Kim Ho Ma, is a 23-year-old Cambodian national who has been a permanent resident of the United States since 1987. In April 1995, Ma, along with four other gang members, ambushed and shot a fellow gang member and left him to bleed to death. Ma was arrested and charged with murder. At his 1996 trial, the jury could not reach a verdict on second-degree murder charges and convicted Ma of first-degree manslaughter. *Reno v. Ma* Petition Appendix ("*Ma* Pet. App.") 56a. Ma was not retried on the second-degree murder charge. As a result of his homicide conviction, Mr. Ma is also subject to a final order of deportation, but to date Cambodia has been unwilling to accept his return. He too argues that he has a right to remain free in American society indefinitely, until such time as Cambodia approves his return.

Proceedings Below. Mr. Zadvydas was taken into custody by the INS in January 1994 following his release on parole by Virginia penal authorities. Petition Appendix B;

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[2](...continued)
fugitive from justice -- he fled Virginia in 1987 to avoid prosecution on drug charges; and (7) a 16-year sentence in 1992 in Virginia for possession of one-half kilogram of cocaine with intent to distribute.

Zadvydas v. Underdown, 185 F.3d 279, 283 (5th Cir. 1999).[3] He had served less than two years on his 16-year sentence for drug trafficking. An immigration judge issued a deportation order in March 1994, finding that Mr. Zadvydas was deportable as an alien who had, *inter alia*, been convicted of an aggravated felony. *Id.* Mr. Zadvydas then applied for a waiver of deportation under 8 U.S.C. § 1182(c). An immigration judge denied the application, noting Mr. Zadvydas's lengthy criminal career and the extensive steps he had taken to avoid the INS's deportation efforts in the 1970s. *Id.* Mr. Zadvydas did not appeal from that denial, and does not now contest that he is subject to a final order of deportation. Mr. Zadvydas remained thereafter in INS custody as the INS attempted to arrange his deportation.[4]

This action began in September 1995, when Mr. Zadvydas filed a petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of Louisiana, claiming that his continued detention violated the Eighth Amendment, due process, and international law. *Id.* at 284. On October 30, 1997, the district court granted the petition,

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[3] References herein to the lower-court decisions are to the West citations, not to the Petition Appendix or to the Joint Appendix.

[4] The INS's difficulties in arranging deportation are set out fully in Respondents' brief. In short, Mr. Zadvydas's citizenship is a matter of some dispute. One undisputed fact is that Mr. Zadvydas is not now, nor has he ever been, an American citizen. He was born in a displaced persons camp in Germany following World War II, the child of parents of Lithuanian ancestry. His parents were born in a region which, at various times, has been under the control of Germany, Lithuania, and Russia. Despite continuing good-faith efforts by the INS, it has been unable to date to arrange for one of those three countries to accept Mr. Zadvydas.

finding that continued detention violated Mr. Zadvydas's rights to substantive due process. Pet. App. A; *Zadvydas v. Caplinger*, 986 F. Supp. 1011 (E.D. La. 1997). The court held that the INS was acting within its statutory authority in holding Mr. Zadvydas for 3 1/2 years following issuance of a final deportation order. *Id.* at 1024. The court nonetheless ordered his release because, the court found, there was no possibility that he would ever be deported and because such "permanent confinement" was inconsistent with his substantive rights under the due process clause. *Id.* at 1026.

The Fifth Circuit reversed. 185 F.3d 279. The court noted that under § 305(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[5] the INS may at its discretion detain indefinitely an alien awaiting deportation/removal if he (as is true of Mr. Zadvydas) is subject to deportation by virtue of having been convicted of an "aggravated felony." *Id.* at 286.[6] The court further noted that the INS has issued regulations stating that it will periodically review the status of all detained aliens who have not been deported within the 90-day "removal period" following issuance of a final deportation order, and that it will release any such alien when it is determined that the alien is not a threat to the community and is likely to comply with the

[5] Section 305(c) was codified as § 241(a)(6) of the Immigration and Naturalization Act, 8 U.S.C. § 1231(a)(6).

[6] The issue of whether IIRIRA § 305(c) does, in fact, permit *indefinite* detention of certain aliens was not addressed by the appeals court. Despite the limited nature of the Question Presented, Mr. Zadvydas now asserts that the INS is *not* authorized under § 305(c) to continue any detentions for more than a short period after a final order of deportation has been issued.

appeals court held, Mr. Zadvydas's continued detention did not violate his substantive due process rights. *Id.* at 288-97. The court said that the detention could not be deemed "indefinite" or "permanent" because: (1) the INS would release Mr. Zadvydas as soon as it determines that he no longer poses a danger to the community and a flight risk; and (2) there was at least a possibility that the INS's continuing efforts to find a country willing to accept Mr. Zadvydas would eventually bear fruit. *Id.* The court said that the infringement on Mr. Zadvydas's liberty "is currently within the core area of the government's plenary immigration power and thus does not violate substantive due process." *Id.* at 294.[7] Mr. Zadvydas has nonetheless remained at liberty pending a decision from this Court.

The Court granted review both in this case and in No. 00-38 on October 10, 2000, and consolidated the cases.

[7] In No. 00-38, the U.S. District Court for the Western District of Washington held, on substantially similar facts, that Mr. Ma's continued detention violated his substantive due process rights. *Ma* Pet. App. 55a-61a. The district court ordered his release from INS custody on September 29, 1999. The U.S. Court of Appeals for the Ninth Circuit affirmed, on nonconstitutional grounds. *Id.* at 1a-33a. The appeals court stated that it seriously questioned whether 8 U.S.C. § 1231(a)(6) could pass constitutional muster if it were interpreted as permitting detention of removable aliens for an indefinite period of time following the removal period. *Id.* at 22a. Applying the doctrine of constitutional doubt, the court interpreted § 1231(a)(6) as allowing the INS to detain a removable criminal alien for only a "reasonable time" beyond the removal period. *Id.* at 25a-26a. When there is no reasonable likelihood that removal can be effected "in the near future," *no* detention following completion of the 90-day removal period is permitted, the court ruled. *Id.*

SUMMARY OF ARGUMENT

The continued detention of criminal aliens shown to pose a risk to public safety, during the time it takes to effect their deportation pursuant to a final deportation order, does not violate their substantive due process rights. Such aliens' liberty interests in being free from detention during that period are far outweighed by the public's interest in being protected from criminal activity. Although one can never know with absolute certainty that a particular criminal alien will renew his criminal activities if released pending deportation, it is a statistical certainty that a significant percentage of criminal aliens who are subject to a final order of removal will, if released, engage in criminal activity.

Mr. Zadvydas's substantive due process claims are foreclosed by this Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). Although the alien in *Mezei* was an excludable alien who was being denied permission to re-enter the country while Mr. Zadvydas is a former resident alien who is subject to a deportation order, that distinction is irrelevant for purposes of substantive due process analysis.

Mr. Zadvydas's statutory claim is equally lacking in merit. The statute at issue, 8 U.S.C. § 1231(a)(6), plainly authorizes the INS to detain a criminal alien for an indefinite period following issuance of a final deportation order.

ARGUMENT

I. CRIMINAL ALIENS WHO HAVE BEEN ORDERED REMOVED FROM THE COUNTRY HAVE NO DUE PROCESS RIGHT TO REMAIN AT LIBERTY WITHIN AMERICAN SOCIETY DURING THE TIME IT TAKES TO EFFECT REMOVAL

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property without due process of law." In general, that clause has been understood to require *procedural* fairness before the federal government may take an action depriving a person of life, liberty, or property. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

But the Court has recognized that the Due Process Clause also includes a categorical prohibition against certain extreme forms of government conduct that result in deprivation of life, liberty, or property. This categorical prohibition, generally referred to as "substantive due process," "prevents the government from engaging in conduct that 'shocks the conscience' . . . or interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952), and *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937)). *Amici* submit that there is nothing "shock[ing to] the conscience" about a law that permits the federal government to protect its citizens by detaining those aliens who have been convicted of aggravated felonies, have been ordered removed from the country, and have been determined to constitute "a risk to the community"

if released from detention during the period necessary to effect their removal.

Amici recognize that individual liberty is a value deeply rooted in American society. Nonetheless, the federal and state governments have regularly countenanced significant restraints on individual liberty where society's interests in imposing such restraints have been deemed sufficiently weighty. No one seriously questions, for example, that government may constitutionally incarcerate those found to have violated the criminal laws, or that government has broad discretion to define what constitutes criminal conduct.

In the civil context as well, the Court has regularly upheld the government's power to require the sacrifice of individual liberty for the sake of the common good. For example, in *Arver v. United States,* 245 U.S. 366 (1918), the Court rejected claims that conscription into the armed forces violated substantive due process, even in times of war. The Court has also upheld compelled vaccinations designed to promote the public health, despite objections that vaccinations can result in permanent injury and death. *Jacobson v. Massachusetts,* 197 U.S. 11 (1905). The Court explained:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.

Id. at 26. *Jacobson* also recognized the right of government to hold citizens in quarantine against their will in order to prevent the spread of disease. *Id.* at 29. *See also O'Connor v. Donaldson,* 422 U.S. 563, 582-583 (1975) (Burger, C.J., concurring) ("There can be little doubt that in the exercise of its police powers a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.").

Given that protecting citizens from crime is one of the most important functions of government, there could be little justification for prohibiting governments from imposing reasonable restraints on individual liberty in order to carry out that function. As the Court recognized in *Schall v. Martin,* 467 U.S. 253 (1984), "The 'legitimate and *compelling* state interest' in protecting the community from crime cannot be doubted." *Schall,* 467 U.S. at 264 (quoting *De Veau v. Brainsted,* 363 U.S. 144, 155 (1960)) (emphasis added). *Schall* rejected a substantive due process challenge to a New York law that permitted pre-trial detention of those charged with juvenile offenses.

The Court has recognized that determining how far government may go in sacrificing individual liberty in pursuit of the common good entails a balancing process:

> In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance "the liberty of the individual" and the "demands of organized society." *Poe v. Ullman,* 367 U.S. 497, 542 (1961)(Harlan, J., dissenting). In seeking this balance in other cases, the Court has weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty.

Youngberg v. Romeo, 457 U.S. 307, 320 (1982).

When that balancing process is undertaken within the context of immigration matters, the balance tilts decidedly in favor of upholding federal restraints on the liberty of noncitizens imposed in the name of national security and safety.

In fact, the law is quite clear that when it comes to matters of immigration policy, the judicial branch has a very limited role to play. As the Court has repeatedly stated, "The power to regulate immigration -- an attribute of sovereignty essential to the preservation of any nation -- has been entrusted by the Constitution to the political branches of the Federal Government." *United States v. Valenzuela-Bernal,* 458 U.S. 858, 864 (1982). As a result, the Court has "underscore[d] the limited scope of judicial inquiry" into immigration-related matters. *Fiallo v. Bell,* 430 U.S. 787, 792 (1977). "The power over aliens is of a political character and therefore subject only to narrow judicial review." *Hampton v. Mow Sun Wong,* 426 U.S. 88, 101 n.21 (1976). *Accord, Miller v. Albright,* 118 S. Ct. 1428, 1447 (1998) (Scalia, J., concurring) ("Judicial power over immigration and naturalization is extremely limited.").

As the Court has explained:

> "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."

Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976) (quoting *Harisiades v. Shaughnessy,* 342 U.S. 580, 588-89 (1952)).

The INS has determined that Mr. Zadvydas and Mr. Ma should be removed from the country, and it is undertaking efforts to effect those removals. It has further determined that release of either man from detention entails a risk to public safety. It cannot seriously be argued that the latter determination is clearly erroneous, given Mr. Zadvydas's life-long criminal career and Mr. Ma's status as a convicted killer with continued ties to a street gang. In light of the judiciary's extremely limited role in immigration matters, there can be little justification for interfering with the INS's decision that Mr. Zadvydas's and Mr. Ma's due process interests in being free from detention are outweighed by society's public-safety interest in removing them from the streets. It is no answer to assert, as does Mr. Zadvydas, that the Due Process Clause would not permit his detention under these circumstances if he were an American citizen. The fact remains that he is not a citizen, but is an alien who has been convicted of aggravated felonies and who, after a full and fair hearing, has been determined by the INS to be unfit to remain in this country. As the Fifth Circuit recognized, this Court repeatedly has upheld the federal government's power to impose restrictions on aliens "that would be intolerable if applied to citizens." 185 F.3d at 289. *See, e.g., Mathews v. Diaz,* 426 U.S. at 81 ("In the exercise of its broad powers over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

Nor can Mr. Zadvydas's case be decided in a vacuum. The decision in this case is likely to affect hundreds if not thousands of cases involving criminal aliens who are subject to final deportation/removal orders but whose removal, for a

variety of reasons, cannot be effected in the immediate future. The impact to date has been most pronounced within the Ninth Circuit, which ruled (in the decision under review in No. 00-38) that such criminal aliens may not be detained for more than 90 days after the order of removal has become final. As of the date it filed its petition in No. 00-38, the INS had appeals pending in 59 Ninth Circuit cases in which criminal aliens had been ordered released from detention under circumstances similar to Mr. Zadvydas's and Mr. Ma's, and was preparing to file notices of appeal in another 40 cases. *Ma* Pet. 15. Moreover, as of that date there were 400 other cases raising similar challenges to detention in various district courts in the Ninth Circuit. *Ma* Pet. 16. One can expect that each of those criminal aliens will be released from detention, as will numerous other criminal aliens in each of the other circuits, if the Court upholds Mr. Zadvydas's substantive due process claims.

It is no answer to such concerns to assert that no one can be certain that Mr. Zadvydas, Mr. Ma, and similarly situated criminal aliens will continue their lives of crime if released into society. *See, e.g.*, Dist. Ct. Opinion in No. 00-38, *Ma* Pet. App. 60a (the government "has failed to advance a single reason for its belief that [Mr. Ma] is a danger to society, beyond the simple fact of his conviction."). To the contrary, it is a *statistical certainty* that a significant percentage of criminal aliens who are subject to a final order of removal will, if released, engage in criminal activity.

A recent major study of criminal aliens conducted by Los Angeles County concluded that a significant percentage of deportable aliens released from jail are rearrested within one year, before their deportation can be effected. Los Angeles Countywide Criminal Justice Coordination Committee,

"Impact of Repeat Arrests of Deportable Aliens in Los Angeles County" [hereinafter, "Impact"], July 15, 1992. The study traced the activity of 1,875 inmates released from Los Angeles County jail in May 1990 who had been identified by the INS as "deportable aliens." Of those 1,875, 772 had been rearrested *within one year* (40%), and those 772 had been arrested a total of 1,522 times. Impact at iv. Moreover, those figures likely considerably understate the rearrest rate, because 974 of the 1,875 criminal aliens were actually deported at or soon after the time of their release. *Id.* If those 974 individuals are eliminated from the study on the assumption that they were not on the streets long enough prior to deportation to have been arrested, then the actual one-year rearrest rate rises to 86% (772 out of 901).

Recent congressional hearings have focused on high recidivism among criminal aliens released by the INS. INS Commissioner Doris Meissner testified at a March 2000 hearing of the House Appropriations Subcommittee on Commerce, Justice, State and the Judiciary that between October 1994 and May 1999, the INS released 35,318 criminal aliens rather than detaining them pending deportation. Ms. Meissner testified that 11,605 of those released have gone on to commit "serious crimes," including at least 1,376 who committed "violent crimes." M. Hedges, "Criminal Aliens Often Released Instead of Deported," Scripps Howard News Service, March 9, 2000. Those 1,376 individuals committed a total of 1,845 violent crimes, including 98 homicides, 142 sexual assaults, 44 kidnappings, 346 robberies, and 1,214 assaults. *Id.*

Moreover, Mr. Zadvydas's substantive due process claims are foreclosed by the Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). In

Mezei, the Court rejected a substantive due process challenge to the continued detention of an alien who had been deemed "excludable" by the INS but who remained "stranded in his temporary haven on Ellis Island because other countries will not take him back." *Mezei,* 345 U.S. at 207. The Court rejected the challenge despite Mr. Mezei's lack of a criminal record, despite the INS's refusal to reveal the evidence which caused it to determine that the alien was "excludable," and despite the Court's recognition "[t]hat exclusion by the United States plus other nations' inhospitality results in present hardship." *Id.* at 216. The Court explained:

> Whatever our individual estimate of that policy and the fears on which it rests, respondent's rights to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate.

Id. If Mr. Mezei's substantive due process concerns were insufficient to warrant judicial interference with the INS's decision to detain him, then surely there can be no constitutional basis for overturning the INS's decision that Mr. Zadvydas, Mr. Ma, and other similarly situated aliens -- who have been convicted of aggravated felonies and who have been adjudged a risk to public safety -- should be detained while efforts to effect their deportation are ongoing.

In an effort to distinguish *Mezei*, Mr. Zadvydas points out that he is not an excludable alien. Rather, he has lived in the United States for more than four decades. Pet. Br. 24-25. That distinction is of no moment. Nothing in *Mezei* suggests that the Court viewed Mr. Mezei's status as an excludable alien rather than as a deportable alien as determinative of his substantive due process claims. More importantly, there is no

rational reason to make such a distinction. As noted above, the substantive due process decision entails a balancing of society's interests in excluding a criminal alien from American society against the criminal alien's liberty interest in avoiding detention. Neither of those interests is dependent on whether the criminal alien happens to be excludable or deportable. In either instance, the INS has an equally strong interest in keeping out of American society all criminal aliens -- whether excludable or deportable -- who pose a risk to public safety. Likewise, a criminal alien who has been adjudged unworthy of being a part of American society has the same liberty interest in being free from detention regardless whether that adjudication took the form of an exclusion order or a deportation order.[8]

Any claim that Mr. Zadvydas's many years in this country have somehow earned him the right to heightened substantive due process rights -- even after his own criminal conduct has led to the forfeiture of all his rights to remain in the United States -- is undermined by the facts of *Mezei*. Mr.

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[8] Case law indicates that aliens (such as Mr. Zadvydas) already present in the United States have available to them *procedural* due process rights unmatched by those seeking to enter the United States for the first time. Procedural due process demands that those present in the United States may not be deported without being afforded a fair hearing on any claim that they are not subject to deportation. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). In contrast, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Id.* But once an alien residing in this country has received a fair hearing and has been determined to have no further rights to remain in American society, there are no logical distinctions between that alien and another alien who has never been admitted. Each has an equally strong liberty interest in avoiding INS detention.

Mezei had lived a crime-free life in the United States from 1923 to 1948 and had been out the country for only 19 months when he was denied re-entry. Yet, nothing in the Court's opinion suggests that Mr. Mezei's substantive due process rights were deemed to have been enhanced by his long-time residency. There is no greater reason to suppose that Mr. Zadvydas's long-term residency should justify an enhancement of his substantive due process rights.

Amici do not mean to suggest that Mr. Zadvydas is not entitled to substantive due process protections. To the contrary, the Court has never indicated that the Constitution's protections are limited to citizens and legally-admitted resident aliens. Obviously, for example, the INS in not free to torture aliens in its custody. Moreover, since the INS's sole reasons for detaining Mr. Zadvydas are to protect public safety and to ensure that he can be located when deportation arrangements are made final, the balancing process required by the Due Process Clause would appear to preclude INS measures designed solely for purposes of punishment. *See Wong Wing v. United States*, 163 U.S. 228 (1896) (due process prohibits imposing a sentence on illegal resident aliens, outside of the normal criminal law process, of one year at hard labor prior to their deportation). But nothing in the case law suggests that Mr. Zadvydas's detention, when effected for the purpose of protecting public safety, violates his substantive due process rights. *Amici* note that, in a very real sense, Mr. Zadvydas holds the keys to the jailhouse door. All he need do is find a country willing to accept him, and the INS's interest in detaining him will completely disappear. Of course, as Mr. Zadvydas himself points out, his own bad behavior makes it less likely that another country will be willing to accept him. Pet. Br. 20-21. But surely, he should not be permitted to turn his own criminal conduct to his advantage by arguing that the

United States should be forced to accept him because his conduct may have disqualified him from being accepted elsewhere.

Finally, Mr. Zadvydas argues that the Court should not in this case display its usual deference to the political branches, because (he asserts) there are no real foreign relations issues at stake. He argues that this case presents "an issue of crime control, not of national sovereignty." Pet. Br. 26. But the political branches have reached a contrary conclusion, and it is not the role of the courts to second-guess that conclusion. The INS argues that a policy of permitting criminal aliens in Mr. Zadvydas's position to be free from detention pending deportation will have a detrimental effect on the willingness of foreign countries to take back their nationals. They may well, the INS argues, be more willing to do so if they realize that their intransigence will result in their nationals languishing in detention for extended periods. Moreover, as the Court recognized in *Mezei*, "Congress may well have felt that other countries ought not shift the onus on us; that an alien in [Mr. Mezei's] position is nc more ours than theirs." *Mezei*, 345 U.S. at 216. The Constitution grants to the political branches, not to the Courts, the resolution of those types of foreign policy issues.

In sum, the INS has not violated the substantive due process rights of Mr. Zadvydas in determining, due to the risk he poses to public safety and the unlikeliness that he would comply voluntarily with a removal order, that he should be detained pending removal.

II. SECTION 1231(a)(6) PERMITS ZADVYDAS'S DETENTION FOR AN INDEFINITE TIME BEYOND THE REMOVAL PERIOD

In denying Mr. Zadvydas's substantive due process claim, the Fifth Circuit held that the INS possessed statutory authority to detain him. Indeed, the Fifth Circuit did not treat that issue as disputed by the parties. Moreover, Mr. Zadvydas's certiorari petition did not list that statutory issue as one of the Questions Presented by the petition. Mr. Zadvydas nonetheless makes that statutory claim in its brief on the merits.

Assuming that the issue has properly been raised, Mr. Zadvydas's claim is without merit. The plain language of the relevant statute, 8 U.S.C. § 1231(a)(6), provides the INS with all the statutory authority it needs. Although the Ninth Circuit reached a contrary conclusion in the case at issue in No. 00-38, that conclusion was based on a misreading of the statute and relevant case law.

Section 1231(a)(6) provides that any removable alien who (such as Mr. Zadvydas) has been convicted of an "aggravated felony" "may be detained beyond the [90-day] removal period" by the INS. The Ninth Circuit correctly noted that the provision does not specify a time limit on the length of any detention following expiration of the removal period. But the Ninth Circuit drew an unwarranted conclusion from the absence of a time limit; it concluded that one could draw no inference regarding congressional intent from the absence of a time limit. *Ma* Pet. App. 10a. The court thought the statutory language could equally plausibly be read as authorizing detentions to continue indefinitely, "for a reasonable time," or some other temporal measure. *Id.* The

language of § 1231(a)(6) cannot plausibly be read in that manner. When a statute authorizes a government agency to do something under specified circumstances (*e.g.*, detain removable aliens who have been convicted of an aggravated felony), there is no reason to infer a congressional limit on the period of time within which the agency is authorized to act, in the absence of language imposing such a time limit.

Such an inference is particularly unjustified in the case of § 1231(a)(6). Congress authorized the detention, beyond the 90-day removal period, of removable aliens who have committed an aggravated felony because of a concern that such felons would commit other crimes if released. That concern does not lessen simply because one month, six months, or six years have elapsed since the expiration of the removal period. Accordingly, there is *no* reason to infer that Congress intended to impose a time limit on the detention of such removable aliens.

In any event, the INS's conclusion that § 1231(a)(6) authorizes indefinite detentions is a plausible interpretation of that statute. The INS's conclusion is entitled to deference, particularly in light of the broad powers granted to the political branches of government in immigration-related matters. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Ninth Circuit concluded that such deference is unwarranted in cases in which the doctrine of "constitutional doubt" arises. *Ma* Pet. App. 10a n.13. But that conclusion robs the political branches of the broad discretion they are due regarding immigration policy. The Court has made plain that the deference to which the political branches of government are entitled extends not merely to the interpretation of ambiguous statutes but also to the drawing of

lines between constitutional and unconstitutional government policy. For example, the Court has long held that immigration-control personnel are not held to the same constitutional standards as other law enforcement officials. *See, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (denying a Fourth Amendment challenge to Border Patrol highway checkpoints at which cars were randomly stopped even in the absence of individualized suspicion of criminal activity; the need to secure areas near the border outweighs citizens' Fourth Amendment interest in not being stopped). *See also, INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (exclusionary rule does not bar use at deportation hearing of admissions made by alien following illegal arrest).

The INS's interpretation of § 1231(a)(6) is also entitled to deference because the INS is exercising its detention authority far more sparingly than the plain language of the statute would allow. On its face, § 1231(a)(6) permits the INS to detain beyond the removable period *any* removable alien who has committed an aggravated felony. However, the INS has issued regulations making clear that the only such removable aliens who will be subject to indefinite detention are those who are also determined to be a risk to the community or unlikely to comply voluntarily with the order of removal, and that any detained alien is entitled to periodic review of such determinations. 8 C.F.R. §§ 241.2 and 241.4. In other words, the INS has chosen voluntarily to limit use of its indefinite detention powers to those aliens with respect to whom society's rationale for detention is strongest. The Ninth Circuit's conclusion that Congress could not possibly have intended such a result (*Ma* Pet. App. 24a), even though that result is consistent with the statutory language and directly serves society's interests, is without merit.

Moreover, as the INS has pointed out, § 1231(a)(6) as interpreted by the Ninth Circuit would constitute a substantial restriction on the INS's previously existing detention powers. Yet § 1231(a)(6) was adopted in September 1996 as part of IIRIRA, Pub. L. 104-208, a law designed to hasten the removal of illegal aliens and to protect citizens from alien criminals.[9] In order to spur speedier removal of such aliens, IIRIRA reduced the "removal period" (the period within which the INS is expected to effect removal following a final deportation/ removal order) from six months to 90 days. It is highly unlikely that such a law would have been a vehicle for Congress to decrease the INS's powers to detain removable aliens pending removal. But that is the effect of Mr. Zadvydas's argument; he insists that Congress intended to hasten the return to American society of those criminal aliens subject to removal whose removal cannot, for whatever reasons, be effected at once.

The Ninth Circuit's and Mr. Zadvydas's reading of § 1231(a)(6) would produce another anomalous result as well. As part of IIRIRA, Congress adopted 8 U.S.C. § 1226(c), which absolutely requires the detention of "criminal aliens" against whom removal proceedings are pending.[10] Yet, if Mr.

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[9] *See, e.g.*, Senate Committee on Government Operations, "Criminal Aliens in the United States," 104 S. Rpt. 48 (April 7, 1995) (recommending legislation to ensure increased detention of alien criminals prior to deportation).

[10] Section 1226(c)(1)(B) states that the INS "*shall* take into custody any alien who . . . is deportable by reason of having committed any offense covered in section . . . 237(a)(2)(A)(iii)." Section 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), provides for the removal of any alien convicted of an "aggravated felony" at any time

(continued...)

Zadvydas's interpretation were adopted, one would have to ascribe to the same Congress that mandated detention of criminal aliens against whom removal proceedings are pending a desire to mandate release of such aliens a mere 90 days after a removal/deportation order becomes final. It is highly unlikely that Congress could have entertained two such conflicting desires. After all, there is *more* reason to support the detention of a criminal alien after he has been determined to be deportable than before the determination has been made, when there is still a possibility that the deportation proceedings have been initiated in error. Yet, under Mr. Zadvydas's interpretation, one is forced to conclude that Congress adopted precisely the opposite reasoning.

Finally, Mr. Zadvydas insists that Congress has had a long tradition of *requiring* the release of deportable aliens whose deportation cannot be effected within a reasonable time, regardless how grave the threat that the alien may pose to public safety. Pet. Br. 31-36. The evidence does not support Mr. Zadvydas's interpretation. For example, Mr. Zadvydas argues that from 1950 to 1990, federal immigration law imposed a strict six-month limit on detention of deportable aliens following a final deportation order. Pet. Br. 33-34. That argument is a misreading of the relevant statute, 8 U.S.C. § 1252 (repealed in 1996); there was no such strict limit on detention. Former § 1252(c) provided that the Attorney General had a six-month period following entry of a

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[10](...continued)
after admission. Mr. Zadvydas does not contest that he has been convicted of an "aggravated felony" within the meaning of the statute. Aliens detained pursuant to § 1226(c)(1) may not be released during the pendency of deportation proceedings, except under very limited circumstances (*see* § 1226(c)(2)) not relevant to this case.

final deportation order during which to effect an alien's deportation. During that period, the Attorney General had discretion to detain the deportable alien, *regardless* whether he had been convicted of any crime. Former § 1252(c) further provided:

> If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section.

Mr. Zadvydas asserts that the quoted language acted as an absolute prohibition against any detention beyond the six-month period, because such post-six-month detention is not "authorized" anywhere in § 1252. That assertion is a clear misreading of the statute. Section 1252(c) "authorize[s]" detention of aliens subject to final deportation orders; accordingly, the language quoted above permitted detention to continue even after the six-month period had expired.[11]

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[11] Mr. Zadvydas's interpretation of former § 1252(c) would render nonsensical the quoted language regarding "such further supervision *and detention*." (Emphasis added.) What would have been the point of Congress including the "and detention" language if Congress did not also intend to permit detention beyond the six-month period in at least some circumstances? Mr. Zadvydas has cited one appeals court decision in support of its interpretation. *Johns v. Department of Justice*, 653 F.2d 884, 890 (5th Cir. 1981). Suffice to say that this Court never endorsed the quizzical interpretation of former § 1952(c) espoused by Mr. Zadvydas.

Moreover, it is uncontested that at least since 1988, Congress had repeatedly adopted measure designed to ensure that the INS was authorized, at its discretion, to detain criminal aliens subject to a final deportation order, regardless of the amount of time that had elapsed after entry of the order. Indeed, as Mr. Zadvydas concedes, for a brief period in 1996, the INS was absolutely *required* to detain aggravated felons who were subject to a final deportation order, regardless of the amount of time that had elapsed following entry of the order. Pet. Br. 35. Against that backdrop, it is highly unlikely that Congress, when it adopted IIRIRA in 1996, would have wanted to reverse course dramatically by imposing strict limits on the duration of detention following entry of a final deportation order.

In sum, the only plausible interpretation of 8 U.S.C. § 1231(a)(6) is that Congress intended thereby to permit the INS to continue to detain deportable/removable criminal aliens for an indefinite period of time following expiration of the 90-day removal period.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court affirm the court of appeals's decision.

Respectfully submitted,

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